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Balancing Trade and Environment

An Ecological Reform of the WTO
as a Challenge in Sustainable
Global Governance

What kind of globalisation
is sustainable?

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Summary

From 10 to 14 September 2003, the Ministerial Conference of the World Trade Organization (WTO) negotiated over a further liberalization of world trade. A lot was at stake there for the environment. It is true that in the current round of negotiations the Doha Declaration has agreed certain points relating to the environment. But this should not conceal the fact that the WTO is still a long way from taking due account of ecological aspects in its policies. The present paper begins by analyzing the discussion on environmental issues within the WTO, which for more than ten years has been conducted mainly in its Committee on Trade and Environment. It is shown that many environmental effects of trade liberalization have not been discussed at all, that conflicts of interest among WTO member-states prevent any deep discussion, and that an ecological reform of the WTO has up to now stood no chance. This analysis then forms the background for a twofold strategy. First, arguments are presented as to why the WTO, given its environmental policy deficits, should afford sufficient scope to institutions actively concerned with environmental policy. The conflictual relationship between Multilateral Environmental Agreements and the WTO is examined at this point. A distinction is drawn between minor and potentially critical conflicts, and it is shown how a limitation of the competence of the WTO's Dispute Settlement Body, together with cooperative political-legal processes to resolve conflicts between affected institutions, might offer a solution and lead to greater institutional equity in the global political arena. Second, the paper discusses how ecological aspects might be integrated step by step into the WTO. After a detailed examination of the potential and limits of instruments like impact assessments, it makes a number of recommendations for their further development. Finally, it considers how impact assessments might be integrated into the WTO's institutional structures, so that ecological aspects can be systematically input into policy-making processes and better public participation in WTO policy be ensured. In this connection, the paper discusses both the integration of impact assessments into the WTO's Trade Policy Review Mechanism and the creation of a new Strategic Impact Assessment Body within the WTO.

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1 Challenges of Sustainable Global Governance

From 10 to 14 September 2003, the Cancun ministerial conference of the World Trade Organization (WTO) negotiated over a further liberalization of world trade. The WTO symbolizes economic globalization as no other international organization does today. The huge significance of international trade is evident in the doubling of global exports since the 1990s. The WTO regulates these trade relations between countries within a complex system consisting of more than twenty multilateral agreements plus numerous accords. The WTO, with its present 148 members, is therefore often seen as “undoubtedly the most advanced expression of the globalization process in the realm of economics” (Brand/Brunnengräber et al. 2000, p. 104).

At the same time, the WTO finds itself the object of mounting criticism from civil society. The thousands-strong demonstrations during the WTO Ministerial Conference at Seattle in 1999, which marked the birth of the movement at the forefront of this critique of globalization, developed into a worldwide series of demonstrations on the occasion of the Cancun conference. The critique of the ecological, social and developmental consequences of world trade policy has brought together such diverse groups as the farmers’ movement in Latin America and the trade unions in industrial countries. The question they all ask is: How can globalization processes be shaped in order to make them fair and sustainable?

Sustainable global governance

The social, ecological and economic effects of international processes of production and exchange raise new questions concerning the regulation and shaping of social development. Given the progressive integration of national, regional and global markets, an exclusively national shaping and control of the effects of world economic activity is regarded as inadequate. In particular, the role of transnational corporations as key players makes it necessary to look for solutions at a level beyond nation-states (Zürn 2001). Intergovernmental institutions such as the WTO are therefore acquiring ever greater scope as a regulative element.

The need for supranational political regulation was first recognized in the financial sector, where deterritorializing tendencies appeared at an early date and have since developed more widely than in other sectors (Lütz 2000). The two institutions that came into being in the aftermath of the Bretton Woods Conference of 1944 (the International Monetary Fund and the World Bank), as

well as the GATT that preceded the foundation of the World Trade Organization in 1995, were early attempts to regulate the world economy.

While these and other institutions have steered the progress of world economic integration for more than half a century, their (negative) social and ecological effects have long been ignored. Only with the 1972 Stockholm Conference did it begin to be asked how world economic integration could be combined with protection of the environment and the preservation of natural and communal goods. Later, with the report of the Brundtland Commission (1987) and the UNCED Conference in Rio de Janeiro (1992), the interdependence of the environment and social-economic development came on to the international agenda. The demand for recognition of the negative social and ecological effects at world level, as the central pillar of a policy of sustainability, had its counterpart in Multilateral Environmental Agreements. These agreements are the core of the idea of *sustainable global governance*. But are they enough? And what role does the world trade system and the WTO play in this connection?

The debate on trade and the environment takes in a number of different perspectives. One key aspect is the relationship between international commercial activity and the global ecosystem. However, there are different views about whether trade liberalization has a positive or negative impact on the environment (UNDP 2003, p. 317). Champions of free trade maintain, for example, that further liberalization would lead to greater material prosperity and is therefore integral to a comprehensive environmental policy; that rich countries generally have higher environmental standards than poor countries; and that free trade is therefore the best way to protect the environment. Critics of this position maintain, on the contrary, that the rise in global trade links is leading to greater use of resources, higher volumes of traffic, loss of biodiversity and destruction of ecosystems. They also argue that trade-generated monetary prosperity would not necessarily be used to finance conservation measures, and that only environmental policy for the regulation of world trade can guarantee protection of the environment. The goals of free trade and regulated trade therefore rest upon conflicting assumptions. They confront each other as contradictory political conceptions that need to be mediated.

Despite all the professions of faith in sustainability – the concept also appears in the preamble of the WTO – economics and ecology are still today usually treated separately from each other. Moreover, precedence is mostly given to economic goals. What steps should therefore be taken to find a better balance between ecological and economic interests? What scope is there for shaping a world trade system that can face up to the future? How limited is that scope?

The starting-point in this paper will be that additional political efforts should be made, both *outside* and *inside* the WTO's regulatory framework, to tackle the

environmental effects of trade liberalization. The two strategic approaches must complement each other, to limit the negative ecological consequences of trade. Against the background of this dual strategy, one crucial challenge for the future will be to balance environmental policy institutions with trade policy institutions (such as the WTO) in such a way that trade interests cannot dominate environmental interests. The other challenge will be to integrate environmental interests into WTO policy and to anchor them in its processes of negotiation and decision-making.

One challenge: A balance between environmental and trade policy

The number of international agreements on environmental conservation has shot up in the last few decades. Especially since the 1992 “Earth Summit” in Rio, a series of international agreements have considerably strengthened environmental interests at a global level. Politically, however, international conservation policy is not in such a strong position. More than 700 agreements, covering some 250 issues (Mitchell 2003), are poorly coordinated with one another. Their aims compete with other international interests, which are sometimes given higher priority. And it is often uncertain whether political commitments are complied with, since the sanctions of most Multilateral Environmental Agreements are ineffective or even non-existent (von Moltke 2001).

In contrast, the founding of the WTO in 1995 brought into being an extremely influential institution in the realm of international politics. The evolution from GATT to WTO may be seen as a paradigm shift in the regulation of world trade (UNDP 2003), involving an extension from trade in goods to various new areas. Whereas the GATT mainly kept to negotiations on the opening of markets and the lowering of tariffs on goods, the WTO agreements now also cover intellectual property rights (TRIPS), cross-border services (GATS), and other issues. WTO law also establishes an exclusive claim to settle trade conflicts between states, together with sanction mechanisms of unprecedented severity. Its member-states have thus accepted the existence of an international referee position of the WTO.

In this context, how can international environmental policy be strengthened vis-à-vis world trade policy? For years many authors have been calling for the creation of a world environmental organization, equipped with a mandate to restructure the United Nations Environment Programme (UNEP), as a counterweight to the influential WTO. Although such proposals have been discussed since Rio 1992, they have not up to now had any political implementation. Even if the present debate shows that, since the *World Summit on Sustainable Development* (WSSD) in Johannesburg in 1992, politicians have not given up attempts to establish a world environmental organization (see e.g. BMU 2003, p. 2; Council of Europe 2003, p. 29), the question arises whether additional strategies are not also

necessary. This paper analyzes how the political scope of the WTO could be restricted in a way that multilateral environmental institutions can better pursue their political goals, and how by this greater institutional equity could be achieved in the global political arena. Chapter three will discuss this in view of the relationship between Multilateral Environmental Agreements and the WTO. A clarification of this relationship is also foreseen in the Mandate of the Doha Round and is therefore high on the current political agenda (WTO 2001b).

The other challenge:

Integration of environmental and trade policy

A balance between environmental and trade policy institutions in the global political arena is not sufficient, however. Ecological aspects must be firmly integrated into all international negotiations and anchored in agreements and institutions. The United Nations has stressed at various times the need for such an integrated policy conception. The Brundtland Report, the key source of the concept of sustainable development, called for joint examination of different interests: “The ability to anticipate and prevent environmental damage requires that the ecological dimensions of policy be considered at the same time as the economic, trade, energy, agricultural, and other dimensions. They should be considered on the same agendas and in the same national and international institutions” (WCED 1987, p. 38). This call found expression in, among others, Article 2 of the Treaty Establishing the European Community, which recognized *„a high level of environmental protection and the improvement of the quality of the environment“* as a task of all EU institutions that *“must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development“*.

The integration of environmental aspects into existing WTO agreements and the planning of further liberalization measures therefore appears necessary in order to confront the negative effects of world trade. In light of the experiences of recent years and an analysis of how environmental aspects have been discussed within the WTO, there is a need for a stronger mandate and suitable instruments to take account of environmental interests. As the analysis in Chapter 2 will show, concern over the effects of environmental measures on trade policy already plays a role inside the WTO. But the question in future must be: What are the environmental impacts of trade? Chapter 4 will discuss the extent to which instruments for the assessment of these impacts can help to strengthen environmental interests within the framework of world trade policy. It will be shown that foreseeable environmental impacts constitute a framework for the future development of free trade policies, and that environmental elements can at the same time be integrated into WTO policy.

Approaches and structure

Chapter 2 first considers the extent to which an ecological reform of the WTO has previously been attempted and achieved. Analysis of the Group on Environmental Measures and International Trade (EMIT Group) as well as the *Committee on Trade and Environment* (CTE) makes it clear that the environmental effects of free trade have not hitherto been adequately addressed within the WTO. It also suggests reasons for the conflict of interests between states in the WTO's discussion of trade and the environment.

Chapter 3 considers the policy conflicts between Multilateral Environmental Agreements and the WTO agreements, and demonstrates the need for a greater balance between environmental and trade policy institutions within the global political arena. It then analyses potential legal conflicts between the WTO and Multilateral Environmental Agreements, and examines how far the WTO limits the introduction of environmental policy measures. It also outlines possible solutions on the basis of law-governed decisions and structural conditions. These possible solutions involve, on the one hand, reform and limitation of the WTO's Dispute Settlement Body and, on the other hand, political-legal processes requiring stronger cooperation between the WTO and other international institutions.

Chapter 4, in seeking the better integration of environmental interests with world trade policy, discusses impact assessments as a tool in a comprehensive evaluation of the ecological effects of trade policies. It first identifies the potential of impact assessments for a "greening" of the WTO's processes of negotiation and decision-making. A list of qualitative criteria is followed by a critical examination of the European Commission's concept of Sustainability Impact Assessments. The opportunities and limits for an integration of environmental interests into the world trade system are emphasized, and proposals are offered for the further development of impact assessments. The chapter closes with a discussion of the scope for the institutional integration of impact assessments into the WTO, and proposes that this be rooted in Trade Policy Review Mechanisms and the establishment of a Strategic Impact Assessment Body within the WTO.

Chapter 5 summarizes the analyses and results, reviews the scope for implementation within existing political processes, and ends by looking at the role that the suggested strategies and instruments for an ecologization of international trade might play in the framework of Sustainable Global Governance.

2 Greening the WTO? Approaches and Opportunities for an Ecological Reform of the World Trade Regime

The conflict between international trade and environmental interests is one of the key areas of controversy in discussions of Sustainable Global Governance. Two basic positions may be taken. It can be asked either what effects environmental legislation has on the WTO/GATT regime, or else what consequences the GATT/WTO regime has for environmental policy. The second of these approaches is evidently the key one in terms of conservation, and it raises three central aspects for further discussion. First there is the question of the relationship of world trade law to multilateral agreements on the environment. Second, it needs to be analyzed what kind of restrictions world trade law imposes on national environmental policy. And third, there is the need for critical examination of the consequences of the WTO's lack of the precautionary principle. The following analysis will show how these and other important issues have been discussed within the GATT/WTO regime, and what are the fundamental approaches to reform.

How environmental interests became an issue

In 1947 the General Agreement on Tariffs and Trade (GATT) came into being. Eight rounds of trade talks between then and 1994 mainly reduced tariffs and other trade restrictions, and negotiated a series of further agreements. On 1 January 1995 the now-superseded GATT, together with the General Agreement on Trade in Services (GATS) and the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), were brought under the roof of the World Trade Organization (WTO).

Both in the GATT and in the WTO agreement, we find direct or indirect references to the environment. The Preamble to the WTO talks of "allowing for the optimal use of the world's resources in accordance with the objective of sustainable development". The GATT provides for important exceptions in Article XX (b) and (g):

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(b) necessary to protect human, animal or plant life and health;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”

Similar, though slightly weaker exceptions may be found in the GATS (Art. XIV b) and the TRIPS agreement (Art. 27/2). Additionally, some of the multilateral agreements on trade in goods reached in the Uruguay Round until 1994 provide for exceptions or identify the conservation of plants, animals and the environment as legitimate grounds for trade restrictions. Nevertheless, conservation issues played no role when the GATT was founded in 1947, and it was only with the increased attention to them since the early 1970s that the relationship between free trade and the environment began to enter the realm of academic debate (Baumol 1971, Siebert 1977, Rubin 1982). The GATT Secretariat also concerned itself with the matter, at least for a while; it produced for the 1972 Stockholm Environment Conference a contribution with the title *Industrial Pollution Control and International Trade*, and set up a special working group on Environmental Measures and International Trade (GATT 1972). This so-called EMIT Group soon sank into oblivion, however, only to be summoned back to life in 1991 in the run-up to the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro. Similarly, a discussion among GATT signatories on the trade in prohibited toxic substances (which took place in the 1980s mainly for health and other reasons) brought no wider attention to environmental issues. Nor did the Punta del Este declaration that opened the Uruguay Round in 1986 make any reference to environmental issues (Gramlich 1995, Tarasofsky 1999).

Environmental concerns found a way into the GATT negotiations only in the early 1990s, largely in response to the pressure of environmentalist groups that had been mounting since the late 1980s. Their criticisms focused on three areas. First, they argued that it was still unclear how trade law related to agreements which directly or indirectly prescribed trade restrictions in pursuit of ecological policy goals. Conservationists feared that international environmental law might lose out to world trade law in disputes handled through the GATT's settlement procedures. Second, they targeted the huge obstacle to environmental protection represented by the GATT's failure to recognize conservation measures affecting production and processing methods. Third, they criticized the lack of a precautionary principle requiring advance provision. Instead of “deciding to ban an activity or product development where the lack of reliable scientific evidence made a decision doubtful” (Jänicke 2000, p. 184), the GATT turned the principle on its head so that any country wishing to impose a trade restriction had to prove its scientific necessity.

The environmental critique came at an awkward time for GATT signatories, since the Uruguay Round entered a deep crisis in the early 1990s, and the agricultural dispute between the USA and the EU threatened to scupper the talks (Mai 1994, Stoll 1994). Given the clash of interests among GATT members on environmental issues, a debate was out of the question within the framework of world trade policy. On the one hand, many industrial countries supported the idea of a discussion, both because of the high level of awareness in the population and because many governments, companies and trade unions were worried that poorer countries might use the lack of regulation as a basis for competitive “environmental dumping” against richer countries where standards tended to be higher. On the other hand, most of the developing countries were totally opposed to dealing with environmental issues within a GATT framework; their priority was economic growth, and conservation was essentially “luxury politics”. They feared that, if environmental standards were made part of a trade policy regime, this would restrict their access to markets in the industrial countries – especially as they accused the latter of using the conservation argument to introduce protectionist measures (Reiterer 1994, p. 478; Jha 2000; Eglin 1998, p. 252; Twin Sal 1999).

Two further developments worsened the conflict. On the one hand, public debate in the early 1990s led to a paradigm shift in which the concept of “sustainable development” (WCED 1987) took over from “the limits of growth” (Meadows 1972). The linking of environmental discourse with development discourse through the concept of sustainable development led to a situation where economic growth – which environmentalists had massively criticized in the 1980s – came by some to be seen again as a desirable goal, or even as a basic prerequisite for ecologically and socially acceptable development. Furthermore, empirical studies indicate a positive correlation between conservation and level of economic development in a particular country.¹ Supporters of free trade were thus able to draw the sting of the critics, but also to inflect the debate by arguing that trade liberalization was a *sine qua non* for conservation and sustainable development.

On the other hand, the EMIT Working Group was finally activated after twenty years on the proposal of the EFTA countries (Nordström 1999, p. 70). It was not supposed to become involved in negotiations and concentrated its mandate, which was limited to investigations only, on three research issues, eventually presenting its conclusions to the GATT Ministerial Conference. These issues were:

1. trade-related measures in a multilateral environment agreements, as these affected the principles and rules of the GATT;
2. multilateral transparency of national environmental measures that might have effects on trade;

¹ On the discussion that took place around the so-called “environmental Kuznet’s curve”, see e.g. Arrow 1995; Nordström 1999, pp. 47ff.; Spangenberg 2001.

3. the effects on trade of new, environmentally motivated packaging and labelling provisions.

From an environmental point of view, the mandate of the EMIT Group was no cause for satisfaction. For its brief was to investigate only the effects of environmental measures on the world trade system, without in turn looking into the possible environmental consequences of expanded world trade.

Approaches to ecological reform

In the view of many economists, free trade and protection of the environment are not in principle opposed to each other, i.e. are mutually supportive (Pflüger 1999, p. 16; Kulesa 2000, p. 187). This view has been given quite an airing in discussions on free trade. For GATT former general secretary Arthur Dunkel, the two goals can certainly be harmonized and indeed reinforce each other: “International trade and the protection of the environment are at heart natural allies” (quoted from Eglin 1998, p. 253). This means that, at least since the 1990s, the question of whether and how environmental aspects should be integrated into the world trade regime has mainly been taken up outside the context of the world trade regime – above all, in academic and environmental institutes.

In what follows, we shall present the most important proposals for ecological reform of the GATT/WTO regime. The three main points raised in criticism of that regime will be of particular interest here: the relationship between world trade law and Multilateral Environmental Agreements; the question of production and processing methods; and the precautionary principle of advance provision.

Various ways have been proposed to clarify the relationship between Multilateral Environmental Agreements and GATT/WTO law. Some call for a special resolution to be adopted by the Ministerial Conference (Althammer et al. 2001, p. 43), which might explicitly and permanently exclude certain environmental agreements from the regulative powers of the WTO – for example, through an expansion of GATT Article XX. There has been some discussion about whether this should be done by expanding subsection (b), (g) or (h) of the Article in question (Helm 1995, p. 124; Biermann 1998), or whether it would be preferable to add a new subsection (k) (Forum Umwelt & Entwicklung 1999). Others have suggested that certain environmental agreements might be specially exempted from WTO law by means of a waiver after either Art. IX, sections 3 & 4 of the Marrakesh Agreement Establishing the World Trade Organization or Art. XXV (5) GATT. This allows the WTO Ministerial Conference, by a three-quarters or two-thirds majority, to release a member from contractual obligations under exceptional circumstances (Helm 1995, p. 123; Motaal 2001). The exemption runs for a limited time period and must be reviewed after one year at the latest – a

clause that leads many authors to consider the whole approach too weak. A number of further proposals, especially in the run-up to the Ministerial Conference in Doha, highlighted various aspects ranging from the preferability of an informal process through the trade policy effects of Multilateral Environmental Agreements the importance of technological support and capacity-building to a “savings clause” for environmental agreements or a reversal of the burden of proof in disputed cases (see WTO 2003). The disarray on the relationship between Multilateral Environmental Agreements and GATT/WTO even included the question of whether the secretariats of particular agreements should be accorded a definite observer status within the WTO.

More fundamental disagreements exist over the recognition of various processing and production methods (PPM), and above all over whether they should be a legitimate reason for unilateral trade restrictions with a view to environmental protection (CIEL/IISD 2003, pp. 6 ff.). Already Carsten Helm, who argued that there was no problem under international law in taking into account the production methods of a particular product, called for an explicit mention of measures with extraterritorial effect in Art. III GATT; “in so far as they relate to protection of the international environment, marginal fiscal and legal adjustments (should also be) permitted for production-related measures” (Helm 1995, p. 131). More far-reaching is the proposal for a separate WTO agreement that would balance out environmental and trade interests and legitimize specific trade restrictions for the protection of particular environmental goods (IISD 1996, p. 5).

The third main theme in discussions of an ecological reform of WTO law is the precautionary principle. The goal of sustainable development laid down in the preamble does imply acceptance of the precautionary principle (Fuchs 2000). But all we find in the laws currently in force is a very restricted form of the precautionary principle, in Art. 5 (7) of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). Here well-founded suspicion, as defined in Principle 15 of the Rio Declaration, is not sufficient unless it is backed up with scientific proof. The group of organizations and states that call for a precautionary principle to be written into WTO law now extends from environmental groups (Forum Umwelt & Entwicklung 1999) to the members of the European Union (European Commission 2000). The most obvious course here would be to revert to the formulations in the SPS Agreement, which – depending on one’s political alignment – might either be taken over as they are or worked up into an unrestricted precautionary principle (Althammer et al. 2001, p. 111).

The WTO discussion of environmental issues

The kind of approaches that an ecological reform of the GATT/WTO regime might envisage are therefore already in existence. But to what extent have they also played a role in GATT/WTO discussions and negotiations? And how much chance do they have of ecologically shaping the world trade system “from within”? We shall address these questions by means of a survey of discussions in the Committee on Trade and Environment, and then briefly look at developments in the administration of justice.

At the 1994 Ministerial Conference in Marrakesh, the EMIT Group concluded three years of work with the presentation of its first report (GATT 1994, pp. 88 ff.; cf. Reiterer 1994, pp. 481 ff.; Tarasofsky 1999, p. 472). Basing itself on this, the Ministerial Conference then decided to convert the EMIT Group into the Committee on Trade and Environment (CTE). Like the EMIT Group before it, the CTE had as its main brief to identify the impact of environmental measures on the world trade system, and to discover whether changes were necessary in the multilateral regulatory system. The CTE’s working agenda contained the following points (GATT 1994; Nordström 1999, pp. 75 ff.; Tarasofsky 1999):

1. Market access issues, especially the relationship between the rules of the multilateral trade system and trade-related environmental policy measures, such as tariffs, taxes and product standards, technical provisions for packaging, labelling and recycling, and issues of transparency.
2. Relations between the multilateral trade system and multilateral environmental provisions, including the relationship with Multilateral Environmental Agreements, the export of “domestically prohibited goods”, biodiversity issues and the TRIPS Agreement.
3. Environmental effects of the agreement on services (GATS).
4. Transparency and the relationship to civil society.

We shall now briefly summarize the specific discussions in the CTE. No reference will be made here to Point 3 (environmental effects of the GATS), as the CTE has not yet identified any environment-related aspects of the GATS. However there is agreement to investigate this area further.²

Market access issues

The issue of the extent and conditions of product access to the markets of other countries has been central to all GATT/WTO negotiations. In connection with

² The following analysis bases itself on published CTE documents: see www.wto.org/environment, as well as Veena 2000; Tarasofsky 1999, pp. 473ff.; Gramlich 1995; Reiterer 1994; Nordström 1999, pp. 88ff.

environmental issues, the discussion has mainly been of ways in which conservation measures might restrict market access. This has been especially important for developing countries, as technical and financial conditions there mean that companies have difficulty in coping with the environmental standards of industrial countries.

This discussion has crystallized around the question of production and processing methods. With certain exceptions laid down in Art. XX GATT, unilateral trade measures targeting the form of production of an import good, in order to protect the environment or the health of a country's population, contravene the principles of the WTO, which in Art. III GATT – or, more precisely, in Art. 2 TBT Agreement – stipulates like treatment of “like products”. Different treatment is supposed to occur only when the products in question exhibit objective differences apparent to all market participants. Discrimination against goods whose production involves negative ecological consequences that do not alter the character of the product is therefore prohibited.³

Under the heading “market access issues”, the CTE primarily discussed the use of instruments such as ecotaxes and ecolabelling. Here too, the positions of industrial and developing countries were usually far apart: whereas many industrial countries regarded them as important environmental instruments, developing countries feared restrictions on their market access. Instead they preferred to see technical and financial assistance for less developed countries as well as positive incentives for ecofriendly production methods. Up to now there has been no noteworthy progress on this issue.

The situation was different with regard to the discussion on subsidies. The majority of governments basically agreed that many subsidies – especially in fishing and agriculture – both distort markets and damage the environment (“perverse subsidies”); and that removal of these subsidies would therefore be a win-win situation: there would be fewer trade distortions and less harm to the environment. And, above all, many developing countries would benefit because they were usually able to pay their firms only considerably smaller subsidies, if any, and this put them at a disadvantage vis-à-vis many industrial countries. This agreement over the removal of subsidies, however, would last only so long as there were no actual applications of it. Japan, for instance, defended its rice and fishing subsidies, or the EU its agricultural subsidies, by referring to the important

³ In the so-called Tuna-Dolphin Case in 1991, Mexico took the USA to the GATT disputes settlement body for its ban on the import of tuna whose fishing had involved the death of dolphins. The dispute settlement panel under the GATT, invoking Art. III GATT and pointing out that like products had to be treated equally, ruled that the US ban was in contravention of GATT law (GATT 1991). Tuna therefore remained tuna, whether or not dolphins perished while they were being caught. – Note that other environment related disputes were disputed with greater care, see Wofford 2000.

role of socio-cultural and regional aspects, such as local traditions or regional development programmes. It is also worth noting that the coalition lines changed on the issue of subsidies. Instead of the usual opposition between developing countries and industrial countries, in the case of agricultural and fishing issues there was a cross-mixture or the formation of new negotiating blocs such as the CAIRNS Group of agricultural exporting countries.⁴

Finally, the CTE also held discussions on the precautionary principle. Here too, differences were observable between industrial and developing countries: for example, whereas the EU and Norway demanded a strengthening of the precautionary principle, most developing countries feared that this would open a gateway to protectionist measures. Up to now there has been no closing of the gap on this issue.

The WTO and Multilateral Environmental Agreements

Multilateral environmental agreements (MEAs), domestically prohibited goods and the TRIPS agreement formed the second part of the CTE agenda. The main focus of discussion was clearly the relationship between MEA and WTO law. Some MEAs highlighted trade sanctions as a means of enforcing their goals, and others provided for measures that would have an effect on trade. Although there have not yet been any actual conflicts between MEA and WTO law, they seem to be very likely in the future.

In the discussion on how to prevent legal disputes, one group of countries – especially developing countries – argued that there was no need for a change in WTO law, as existing commercial law was quite sufficient to cover trade-related environmental measures. Other countries called for adjustments to world trade law to take into account the challenge of MEAs. A rapprochement between the two groups looked difficult to achieve.

Participants in the discussion argued that the reform proposals should apply either *ex ante* or *ex post*. The European Union and Norway were more in favour of *ex ante* measures such as an interpretative clause in Art. XX GATT or a supplementary Art. XX (k) GATT, either of which would establish criteria that an MEA would have to meet to be recognized as an exception. Examples of such criteria would be a transparent negotiation procedure, scientific evidence of the importance of the environmental problem, specification of the trade-related measures in the text of the appropriate contract, necessity and proportionality of the measures, and a principle of least trade restrictiveness. Switzerland went considerably further by proposing a “coherence clause”, according to which the provisions of an MEA would have to be treated equally to those of the WTO in

⁴ The Cairns Group is made up of Argentina, Australia, Brazil, Canada, Chile, Colombia, Hungary, Indonesia, Malaysia, New Zealand, the Philippines, Thailand and Uruguay.

the event of a dispute. As to *ex post* measures, most of the discussion centred on a waiver under Art. XXV (5) GATT.

A further focus of the discussion on MEAs was the relationship between WTO dispute settlement mechanisms and those of MEAs. Most time was spent on analysing the WTO procedure, because there had been little experience of dispute settlement in the context of MEAs. With regard to conflict between two WTO members on trade-related measures under an MEA, the CTE showed a slight preference for dispute settlement within the MEA in question (Tarasofsky 1999, p. 479). In the end, however, there was little clarity on this issue either.

The relationship between WTO law and the TRIPS agreement was repeatedly placed on the agenda, mainly by India and other countries of the South. It is true that there was majority support for a patent protection agreement within the WTO, but there were numerous differences of opinion over detailed issues. India vainly demanded, for example, that the stipulations of the TRIPS agreement should be relaxed in certain cases, in order to make it easier to use technologies necessary for the implementation of MEAs (Jha 2000, p. 390). There were also disagreements over the relationship between the TRIPS agreement and the Convention on Biological Diversity. Whereas some members saw no conflict between the two, developing countries in particular called for the principles of the Convention on Biological Diversity to be integrated into the TRIPS agreement. Others further thought it necessary to completely rule out the patentability of plants and animals under Art. 27 (3) b TRIPS Agreement. Here too, discussion has still not gone beyond a first approach to the question.

Nor was there any major progress on how to deal with domestically prohibited goods. Although the topic had been discussed in a GATT working group since the 1980s, issues connected mainly with risk evaluation still remained open. Member countries were similarly unable to agree on a clear definition of domestically prohibited goods.

Transparency and relations with civil society

Another central theme of the CTE working programme was the transparency of national rules for other member states. National trade restrictions introduced because of environmental policies or other measures often escape the knowledge of other states and hamper trade. Member states therefore agreed that one of the WTO's cardinal aims must be the greatest possible transparency of trade-related environmental measures. If possible, planned regulations should be made known well in advance. Progress was made on this within the CTE, but it fell short of expectations. The CTE simply proposed the creation of a data base with as much information as possible. Since 1998 such a data base has been at the disposal of all member states.

Two aspects, in particular, came up for discussion under the heading “Relations with Civil Society”. First, the CTE took on board the decision of the General Council (18 July 1996) that all WTO bodies should develop greater transparency towards the public. The CTE went much further in this respect than other WTO structures by deciding to publish many of its documents. Second, the opening of CTE sessions to institutions of civil society was discussed. Whereas the CTE did provisionally introduce ad hoc observer status at its sessions for specific international institutions such as the UNEP and the secretariats of MEA, non-governmental organizations have not at any time obtained observer status.

Developments in Dispute Settlement Rulings

The Dispute Settlement Body is another WTO body alongside the CTE dealing with environmental issues. The dispute settlement panels of the GATT drew massive criticism for some controversial rulings in cases related to environmental policy (Pfahl 2000, pp. 104 ff.). Since the founding of the WTO in 1995, however, there have been changes in the administration of justice, through such innovations as a permanent Appellate Body. In particular, the rulings in the US Gasoline case of 1996 (WTO 1996) and the US Shrimp Turtle case indicate that the settlement of disputes has already become considerably more objective and professional. The reasons for this are the higher qualification and greater independence of members of the Appellate Body, but also the more formal character of the process (Wofford 2000, p. 569). This may have the result that dubious legal interpretations of Article XX GATT are a thing of the past. But there are still a number of areas of uncertainty. Since the WTO makes no allowance for case law, it is always possible that the Dispute Settlement Body will interpret an article in a way that conflicts with previous judgements. At the same time, a number of central questions remain open – for example, whether processing and production methods can serve as grounds for trade restrictions motivated by environmental policy; how the precautionary principle should be handled; or how WTO law and MEAs are related to each other (Kulesa 2000, p. 181).

Chances of an ecological reform of the WTO?

The connections between trade and environment have been discussed for more than ten years within the GATT/WTO. But the results so far are not satisfactory from an environmental point of view. No progress worth noting has been made on any of the topics under discussion. Given the disarrays within the WTO over environmental issues, what are the likely prospects for efforts to achieve an ecological reform of the WTO?

It could be clearly shown that the conflict of interests between most developing countries and industrial countries still appears insuperable. In particular, poorer countries fear for their market access and accuse richer nations of playing with

conservation and “ecoprotectionism”. At the same time, the opportunities for ecological reform are constricted by the narrow focus that both the EMIT Group and the CTE have always adopted. They have largely excluded discussion of negative environmental effects of trade liberalization, using the argument that the WTO is not an environmental organization and that the solution of environmental problems is the task of organizations created for that purpose. Instead, the CTE has proceeded on the assumption that economic growth is a major prerequisite for worldwide sustainable development, and that free trade as such is in accord with the requirements of conservation. On this view, environmental measures are compatible with WTO law only in so far as they do not endanger the open, non-discriminatory system of world trade.

Many issues related to the environment have therefore not been discussed: for example, the effects of the current GATS-enabled liberalization of services, or of further possible areas for liberalization such as the so-called “Singapore issues” that have been the subject of debate for the past four years. The “chilling effect” of trade measures on national environmental policy has similarly been left out of account.

Finally, it should be noted that many environment-related issues have been discussed in other WTO structures as well as the CTE. For example, ecolabelling and market access issues are on the agenda of the Committee on Technical Barriers to Trade, and agricultural subsidies on that of the Committee on Agriculture. Here, even more than within the CTE, trade-related environmental measures are usually treated as non-tariff barriers to trade. This being so, it appears actually counterproductive that the responsibility for environmental policy within the WTO should be given exclusively to the CTE, while other structures are not supposed to concern themselves with them. Attempts to define environmental issues as an across-the board responsibility have so far failed because of the opposition of developing countries, which fear that they might lose control over the relevant decisions.

Recent developments at the Fourth Ministerial Conference, held in Doha, Qatar, should not make us forget that there is still a long way to go before an ecological reform is achieved. The Ministerial Declaration at Doha, on 14 November 2001 (WTO 2001), did address the question of the environment: the goal of sustainability is mentioned in the preamble and at several other points, and there is a special section on trade and the environment that draws a distinction between two categories. Paragraph 31 establishes which issues will be negotiated in the coming round: (i) the relationship of MEAs to WTO law; (ii) the exchange of information between the secretariats of particular MEAs and the relevant WTO structures; and (iii) the lowering or abolition of customs duties and non-tariff barriers to trade in environmental goods and services. Paragraph 32 identifies other areas for CTE attention in the future: (i) the effects of environmental measures on market access

(especially for the least developed countries); (ii) the environment-related provisions of the TRIPS; and (iii) ecolabelling issues.

But what at first appears to be a great advance in environmental policy turns out to confirm the points made in the above analysis. Here too, with regard to the link between free trade and the environment, the WTO persists in starting with the effects of conservation measures on the world trade system. Next, the Doha Declaration limits its consideration of the relationship between MEAs and WTO law to disputes where both parties are members of the MEA in question, and where it provides for specific trade obligations. Many important areas such as production and processing methods are not touched upon at all. And it remains an open question what should happen in areas not specifically identified as trade-related: for example, the liberalization of agrarian markets or of the energy and transport sectors within the GATS.

Challenges

From the above analysis, it follows that the WTO in its present form does not appear capable of solving conflicts between trade liberalization and environmental protection. Environmental interests are not sufficiently integrated into current WTO law, nor, in view of the existing differences, are there realistic prospects of an ecological reform of the WTO. So, how can conservation interests nevertheless be helped to make a breakthrough in the context of the world trade regime?

The answer to this question involves a twofold strategy. First, given that an ecological reform of the WTO is presently out of reach, the first requirement is obviously that the policies of all institutions actively engaged on environmental issues should not contradict one another. If the WTO itself does not pursue an environmental policy, the institutions that do have such a responsibility should be given a broader mandate and scope for action. This means that the WTO's own scope for action should be limited in favour of such institutions. The WTO should be restricted to its trade policy mandate, and dissociated from measures and decisions that might conflict with the policy of environmental institutions. Chapter 3 will discuss this first approach as it bears upon the relationship between MEAs and the WTO.

Second, instruments and mechanisms must be found for the gradual integration of environmental interests into the WTO's discussion and decision-making procedures. This would, so to speak, be an early form of an ecological reform of the WTO. For, before environmental policy interests can be adequately considered or integrated within the WTO, it is first necessary to address the link between trade policy and the (negative) environmental effects that it induces. Only when these links are properly addressed within the WTO will an ecological reform of the institution again enter the realm of the possible. Chapter 4 will take this up in greater detail, with the help of instruments for impact assessments.

3 Conflicts between the WTO and Multilateral Environmental Agreements

The last chapter showed how remote the WTO, as an institution, remains from an ecological reform. As we shall see in the present chapter, conflicts of interest between environmental and trade policy even appear to rule out any far-reaching integration of environmental policy into the WTO. Other institutions are better suited for the development of specific policy measures concerning the environment. Indeed, a comparative study of the existing environmental and trade regimes points to systemic policy-goal conflicts that we shall now proceed to examine more closely with regard to the relationship between the WTO and Multilateral Environmental Agreements.

The relationship between Multilateral Environmental Agreements (MEAs) and the WTO has already been under discussion for more than ten years. In principle, international environmental and trade law stand on an equal footing; neither is subordinate to the other. But which law applies when an environmental agreement provides for trade restrictions to achieve certain goals – WTO law or environmental law? With the Doha Declaration and the start of the present round of WTO negotiations, the relationship between the WTO and MEAs has assumed a prominent role in WTO negotiations and for the first time been placed on the agenda of talks at ministerial level.

The “Trade and Environment” Section of the Doha Declaration

§31 With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on:

- (i) the relationship between existing WTO rules and specific trade obligations set out in Multilateral Environmental Agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;
- (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;
- (iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

Different logics, conflicting values

In many international political agreements, one finds the position that world trade and environmental protection are in principle mutually conclusive. The preambles of the WTO, the Rio Declaration or various MEAs seem to be reassuring each other as they assert that their respective agreements contribute to the goal of sustainable development. Yet these assurances conceal the fact that international trade and environmental policy may not only complement but also contradict each other. In many respects, environmental and trade policy do not obey the same logic. Often they reflect conflicting values and different perceptions of their underlying assumptions and problems; a clash of political goals exists between them. Five contradictions will serve to illustrate this point.⁵

(1) MEAs are a response to **market failures**, expressed, for example, in the defective protection of public goods (“tragedy of the commons”). They start from the assumption that the problems they address cannot be solved through the “invisible hand” of the market. By changing the legal framework of the market or employing economic instruments to influence individual behaviour, they aim to achieve a correction of market mechanisms. World trade policy, on the other hand, sees itself as a response to a **failure of the state**, expressed, for example, in protectionist or (formerly) mercantilist measures. Through the lowering of tariffs or the elimination of non-tariff barriers to trade, it therefore seeks to minimize political trade distortions and to ensure the smoothest possible functioning of market mechanisms.

(2) The significance of the precautionary principle as the core of environmental policy has already been spelled out in Chapter 2. As a rule, MEAs seek to achieve active application of the **precautionary principle**. In WTO agreements, on the other hand, the precautionary principle is **excluded**. The Biosafety Protocol of the Convention on Biodiversity, for example, permits member-states, even in the absence of a scientifically predictable risk, to grant a ban on imports of genetically modified organisms; whereas the WTO excludes import restrictions when there is a lack of scientific proof (see also Box “Example 1”).

(3) World trade policy strives for the **increase of economic activity**, through the dismantling of trade barriers and the simplification of cross-border movement in goods and services. Environmental agreements, by contrast, aim at the **limitation of certain economic activities** and of the exchange of at least some harmful goods. The Stockholm Convention, for instance, is supposed to reduce the

⁵ The contradictions do not apply equally to all environmental agreements, since the problem areas and attempted solutions are too diverse.

production of “persistent organic pollutants”, and the Basle Convention the trade in toxic waste. The difference is especially striking in the case of the international climatic regime. The Framework Convention on Climate Change and the Kyoto Protocol will lead in the long term to a reduction in cross-border transport and trade – at least so long as such trade causes a rise in greenhouse gas emissions. The WTO agreements, on the other hand, seek to expand the cross-border movement of goods.

(4) The world trade policy of the WTO strives for the most efficient possible **allocation** of resources. It does regard resources as scarce (their production costs something), but it sets no limits on their availability. Environmental agreements, by contrast, usually base themselves on the finitude of natural resources (already Meadows 1972), in providing both for their conservation and for a adequate **distribution**. In the Kyoto Protocol, limits on the output of greenhouse gases are at the same time a key to the distribution of emission rights. Similarly, the Montreal Protocol sets precise targets for each member-state with regard to the permissible output of ozone-depleting substances.

(5) World trade policy, with its quest for the greatest comparative cost advantages, implies a maximum **externalization of costs**.⁶ If the externalization of costs involves a lowering of social and environmental standards, or the free employment of exhaustible global common goods, it may bring negative consequences in its train. MEAs to limit the negative effects of world trade aim at an **internalization of these external costs**, usually through improvements in environmental liability and property law. Recently, however, there have also been proposals to internalize external costs by means of environmental taxes (WGBU 2002).

The five examples make it clear that environmental and trade policy pursue partly conflicting social values. Trade policy would like to bring about a unified legal space for the world economy, but it does not strive for unified (minimum) standards in environmental or social policy. For, as John Gray puts it in a nutshell, “global markets in which capital and production moves freely across frontiers work precisely because of the differences between localities, nations and regions. ... There would not be profits to be made by investing and manufacturing worldwide if conditions were similar everywhere” (Gray 1999: pp. 57 f.). Environmental agreements, on the other hand, do aim at single (minimum) ecological standards and the same protection of exhaustible common goods all around the world – even if their implementation may vary in accordance with the principle of common but different responsibilities among countries with differing capacities.

⁶ Of course, comparative cost advantages may also be achieved without any externalities. But the greater the external costs, the greater is the relative cost advantage.

Institutional equity in the global political arena

Conflicting interests and values at international level reflect similar conflicts at national level. In the latter case, however, mechanisms have taken shape which ensure that the formulation of political demands and objectives takes a democratic form. Before an environmental measure is adopted on the national level, it usually has to pass through a large number of ministries and policy departments, the parliament, the upper chamber, the presidential council, and so on – and for all this time it is generally also the focus of public debate in the media. Such mechanisms have up to now been largely missing in the tangle of international institutions, the foreign policy of nation-states, and various internationally active organizations of civil society. Mechanisms must therefore be developed to guarantee various social values at an international level. One aim should be to offset the predominance of one particular institution, with its limiting consequences for other democratically legitimate institutions. In other words, the aim should be the equality of international institutions representing different interests – “institutional equity” in the global political arena.

It will be shown that the WTO, as it exists at present, jeopardizes such institutional equity in the global political arena. In a number of respects, the WTO exhibits political dominance in relation to multilateral agreements. Its international policy hegemony is already indicated by the fact that, in the context of the Doha Round, the WTO Ministerial Conference has full powers to clarify the relationship between world trade law and multilateral environmental law, without having to reach agreement with the UNEP or the interministerial conferences that take place within the framework of environmental agreements.

For all this, it should not be forgotten that world trade is no more than a means of achieving various political goals. Protection of the environment is itself a goal, however – which is why we have already stressed the need for the WTO to recognize multilateral environmental law.

Conflicts of norms and political goals

Up until now, no conflict between international environmental law and trade law has been taken before an international court of arbitration. There are several levels, however, at which world trade law and MEA trade-related law might potentially clash. First, a number of MEAs provide for trade restrictions as their core measures; their aim is directly to limit the negative effects associated with trade, by restricting or even prohibiting cross-border commerce in certain goods. This has the potential to produce conflict with the WTO over standards. Particularly relevant here are the Basle Convention, the Washington CITES Agreement, the Biosafety Protocol, and the (not yet in force) Rotterdam and Stockholm Conventions (see also Box “Example 1”). There are also MEAs which provide for

trade restrictions only where obligations agreed under the MEA have not been fulfilled. In such cases, a conflict with the WTO arises only if countries do not meet their commitments in the context of an MEA. This applies to the Montreal Convention, for example.

Example 1 Potential conflicts between the Biosafety Protocol and the WTO Agreement

An example of possible conflicts between the WTO and an MEA is the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Biosafety Protocol), which was adopted in January 2000 and came into force on 11 September 2003. It regulates cross-border trade in genetically modified organisms that might have negative effects on the conservation and sustainable use of biodiversity. The Biosafety Protocol stipulates that, for the export of genetically modified organisms, written notice should be given to the importing country when a negative effect on its biodiversity is suspected (Article 7 BP). This requirement might come into conflict with Articles IX and XIII GATT, under whose terms it might be considered a non-tariff barrier to trade. The Biosafety Protocol also gives states the right to demand a prior scientific impact assessment for all organisms that necessitate written notification of trade partners (Article 15, Appendix III BP). On the basis of the impact assessment, the importing country may then, if applicable, prohibit the import of those organisms (Article 10.3(b) BP). Although there is a significant overlap here with the requirements of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), one significant difference is that, in the absence of scientific proof, the Biosafety Protocol permits countries which are party to it to maintain an import ban (Articles 10.6 and 11.8 BP); the precautionary principle would then provide sufficient grounds. In such cases where there is a lack of scientific evidence of a possible risk, the SPS Agreement of the WTO permits only a temporary import ban that must not be maintained if the lack of scientific proof persists (Article 5.7 SPS). Another difference is that the SPS places the burden of proving a risk on the importing country, whereas the Biosafety Protocol gives the importing country the right to make the exporter carry out the scientific impact assessment (Article 15.2 BP).

Second, many MEAs do not contractually provide for trade restrictions, although certain political measures or goals may have a bearing on trade. This might result in a conflict with the WTO – for example, if a country considers that its rights under the WTO are being infringed by other rights under an MEA. If, in such cases, there is at first more of a conflict between political goals (programmatic conflict) than a legal conflict (normative conflict), a complaint lodged by one country can rapidly give it a legal dimension. This is true of a large number of MEAs – for example, the Convention on Biodiversity and the (not yet in force) Kyoto Protocol (see Box “Example 2”).

Example 2 Potential conflicts between World Climate Convention or Kyoto Protocol and the WTO Agreement

The UN Framework Convention on Climate Change (UNFCCC) adopted in Rio in 1992, and the Kyoto Protocol, authorize no further measures apart from the intergovernmental transfer of emissions to attain the goal of reducing greenhouse gas emissions. It is evident, however, that the states which are party to the Convention must introduce a series of measures at national level if they are to meet their commitments. Conflicts with WTO law are possible in the case of a number of climate measures (see Charnovitz 2003 and Buch/Verheyen 2001).

First, measures favouring energy-intensive or greenhouse gas-intensive goods against climate-friendly goods might come into conflict with Article III GATT, on the grounds that they discriminate against other energy sources and hinder their market access. Second, taxes, customs duties or compulsory product standards that differentiate between goods on the basis of their energy or greenhouse gas-intensity during production might conflict with Article III.4 GATT and the Agreement on Technical Barriers to Trade (TBT), which perhaps allow for no distinction between otherwise “like products”. Third, marginal taxes on energy-intensive goods from countries not party to the Protocol might violate Article I GATT and the Most Favoured Nation-principle. Fourth, the compulsory labelling of products with reference to energy or climatic factors – for example, the greenhouse gas-intensity of electricity – might be considered a technical barrier to trade under the TBT Agreement. And fifth, special subsidies to firms for climate-friendly research and development might be deemed impermissible under the Agreement on Subsidies and Countervailing Measures (SCM).

Third, conflicts might arise because the WTO and MEA involve different procedures in the settlement of disputes. If disputes between the MEA and WTO are handled under WTO legal procedures, this may entail a dramatic “chilling effect” for future MEA negotiations (Fuchs 2000, p. 22). An MEA and the political measures required for its implementation would then always have to be negotiated with one eye on their compatibility with WTO law – which might mean a clear narrowing of multilateral efforts to solve global environmental problems (OECD 1999, p. 37). This effect could already be observed in the final phase of negotiations on the Biosafety Protocol (Neumann 2001, pp.250 ff.).

Differentiation and interpretation of potential conflicts

In the analysis of possible WTO-MEA conflicts, the first issue is whether the parties to a dispute are signatories of the MEA in question. In this context, it is important whether trade restrictions are directed only against countries that have ratified the MEA, or also against third countries. A further distinction must be drawn between cases where the MEA is or is not more or less universally accepted. And finally, in all three cases, it must be considered whether the MEA explicitly prescribes or at least allows for a particular measure, or whether one country has introduced a trade restriction only with an MEA reference invented by itself. The cases of conflict may be grouped under the following six types (Table 4):⁷

⁷ Marceau argues for a further distinction between compulsory and explicitly permitted measures (Marceau 2000) – a distinction which did in fact enter the negotiating process during the Doha Round. See, for example, the proposals submitted by Switzerland (TN/TE/W/21) and Japan (TN/TE/W/26).

Table 4: Categorization of conflicts between Multilateral Environmental Agreements and the WTO Agreement

		A	B	C
		Both parties belong to MEA	Only one party belongs to MEA with near universal status	Only one party belongs to MEA without near universal status
1	Application of measure authorized by MEA enjoined or explicitly	MEA has precedence over WTO (<i>lex specialis</i>)	MEA is exempt from WTO Ausnahme des MEA von der WTO	?
2	Measure not mentioned in MEA	?	?	?

Lex specialis and general exemptions from WTO

It may be assumed from the start that at least two of the six categories do *not* normally conflict with WTO law. If both parties to a dispute are members of the relevant MEA, and provision is made in the MEA for the measures taken (Category A1), then the principle *lex specialis derogat legi generali* applies (Marceau 2000, p.1092; Winter 1999, pp. 237 f.; Yu 2002; et al.). This principle states that, where two sets of rules exist under international law, the more specific takes precedence over the more general. Thus, for example, whereas the GATT regulates trade in goods in general, CITES regulates specific dealings in endangered animal and plant species. In a dispute involving a clash between the two, the latter will take precedence over the former.

If only one country is party to the relevant MEA, then the Vienna Convention on Contract Law (Art.30.4(b)) stipulates that the judgement should proceed in accordance with the agreement to which both countries are party. As a rule, this will be the WTO Agreement. According to Article XX GATT, XIV GATS and Article 27 TRIPS, a general exception may be requested for measures incompatible with WTO law. A measure must also meet certain requirements. On the one hand, it must not constitute an arbitrary restriction of trade; and, on the other, it must be a measure necessary to attain a political goal. In so far as near-universal MEAs represent an international consensus both about the problem at hand and about the specific measures to be taken, they offer a clear basis for a general exemption from WTO law. The starting-point should therefore be that, where environmental measures are taken in connection with a near-universal MEA and explicitly claimed under that MEA (Category B1), it is highly probable that they will qualify for a general exemption from the GATT, GATS or TRIPS (Yu 2002; Neumann 2001; Neumayer 2000; Senti 2000; Althammer 1999; Biermann 1999; Winter 1999; Foster 1997; Hudec 1997).

It is true that no fixed legal definition attaches to the concept of “near-universality”. The criterion to be used in defining it might be how many countries are party to the MEA, or whether membership in it is open to all countries, or whether, for example, patronage of the agreement lies with the United Nations (Biermann 1999, pp. 41 ff.). In the event of conflict, the international legal status of the MEA, and if applicable of the WTO agreement as well, would have to be decided on an individual basis. And, as we have already said, if the case is sent before the Dispute Settlement Body of the WTO, it is there that the decision has to be made. We shall consider this problem below in greater detail.

Case by case-settlement of disputes through the WTO

In the remaining cases, it is considerably more difficult to advance generally applicable statements. Where environmental measures are taken in connection with a non-universal MEA, or where they are not explicitly authorized for the implementation of its aims, there can presumably be no claim in principle for exemption from the GATT, GATS or TRIPS agreement of the WTO. Both cases will then require a specific ruling under international law on the legal validity of an environmental measure in relation to the WTO Agreement.

On the one hand, for MEAs without near-universal status, there is the question whether the exemption of measures taken with reference to them is in itself legitimate politically and in international law (Categories C1 and C2). Many countries fear that, by means of exemptions under Article XX GATT or Article XVI GATS, a protectionism legitimated in terms of environmental policy will make its way into the world trade regime. Developing countries, in particular, fear that an exemption clause will enable industrial countries with great market power to impose their production standards on countries with less market power (OECD 1997, pp. 9 f.). It should therefore not be assumed that a dispute settlement body would, in the absence of proof, grant an application for exemption on the basis of an MEA that did not have near-universal legitimacy.

On the other hand, for MEAs that do not explicitly authorize trade restrictions, the problem arises under international law that they cannot claim any mandate for the regulation of trade issues (Categories A2, B2, C2). Hence the *lex specialis* has no application here either (Yu 2002, pp. 7 f.). The question must therefore be considered whether measures taken with reference only to an MEA are really *necessary* to fulfil the obligations resulting from that agreement. The starting-point here should be that trade-related measures taken on the basis of such MEAs will, in disputed cases, become the object of WTO law (Biermann 1999; Yu 2002, pp. 8, 12; Buck and Verheyen 2001). Even if the aims, rights and obligations of the respective MEA command near-universal recognition from the international community, there would then be no difference from the situation in which one country had taken unilateral action.

The settlement of such a conflict would follow the WTO's dispute settlement procedure, which, in accordance with Articles XX GATT, XIV GATS, 27.2 TRIPS and 2.2 TBT Agreement, requires investigation of the actual *necessity* of the measure in question. This would mean checking and weighing: the extent to which the measure serves interests and values of general significance and constitutes an appropriate and effective means of achieving the stated aims; the other consequences of the measure, especially with regard to trade flows; and, where applicable, the practicability of other measures that would have fewer effects on trade (WTO 1998). The results of this so-called "necessity test" vary from case to case and are strongly context-dependent; options for reaching a solution cannot be generalized (OECD 1999, p. 37). As we shall see, none of the previously tabled reform proposals has therefore contributed to the solution of such potential conflicts between MEAs and the WTO.

A critique of existing reform proposals

Since the second half of the 1990s, many countries have submitted proposals of their own for how the conflict between MEA and WTO law should be solved. But, even after years of discussion in the CTE of the WTO, there is still no agreement over the assessment of potential conflicts and any new measures to be taken (see Chapter 2). As the question of the recognition and status of the MEA vis-à-vis the WTO has been sometimes directly but always indirectly at issue, the debate has remained caught between a desire for harmonization of the international legal system and a fear of loss of control by the WTO or loss of status by the MEAs (Motaal 2001, p. 1224).

The preceding analysis further suggests that none of the proposals discussed in the CTE – neither a waiver, nor an interpretative ruling, nor a new Article XX (k), nor a reversal of the burden of proof – offers a solution to the problems (see Chapter 2). None appears to be necessary for measures explicitly authorized in near-universal MEAs or for cases where both parties to a conflict are members of the MEA in question (Categories A1 and B1, Table 4). A primacy of world trade law over international environmental law cannot be established in such cases. This conclusion probably applies, for example, to the Montreal Protocol, the CITES, and the Basle Convention. There is no need for a reform to strengthen these MEAs legally or institutionally vis-à-vis the WTO. It is therefore even unclear what is up for negotiation under §31 (i) of the Doha Declaration. The negotiating mandate, in fact, is limited to cases presented above as unproblematic – that is, where an MEA provides for direct restrictions on trade, or where both parties to a dispute are members of the MEA in question.

On the other hand, medium to long-term conflicts are probably to be expected in the case of MEAs that have neither near-universal status nor a sphere of their own

where they regulate trade policy – especially if one of the parties to the dispute is not a member of the MEA in question (Categories A2, B2, C1 and C2). Such conflicts must therefore be settled on a case by case basis. If this happens before the WTO's Dispute Settlement Body, then this body decides *de facto* how and with which measures the rights and obligations of one country should be implemented. To make it clear: the international status and legitimacy of the political goals contained within these MEAs are thereby entrusted to the WTO and its Dispute Settlement Body.

The proposal of some countries to extend the negotiating mandate under §31 (i) of the Doha Declaration to a wide range of specific trade measures – not only measures explicitly authorized by MEAs but all others directly or indirectly derivable from its political goals – also appears to be rather unhelpful and inadvisable. For an extension of the mandate within WTO negotiations would necessitate a definition of MEAs and a distinction between “legitimate” and “illegitimate” measures for their implementation (see WTO 2003). Such a distinction seems generally difficult to draw with regard to the plethora of conceivable measures for the implementation of MEA objectives. Nor is it understandable from an environmental point of view why this differentiation – in so far as it can be drawn at all – should not rather occur in MEA negotiations, UNEP, or the respective MEA secretariats. As we have seen, the necessary competence for this cannot be expected to come from the WTO. Besides, an isolated WTO examination of individual measures rooted in MEAs might jeopardize the international consensus regarding a particular MEA. For the recognition of some but not other measures weakens the integrity of MEAs, which in their specific ways represent the interests of various member-states and carefully balance the rights and duties of these states through a mix of measures. At the same time, a partial recognition of measures fragments MEAs and may limit their environmental effect (Xueman 2003, p. 18).

There is also the fact that a WTO distinction between “legitimate” and “illegitimate” MEA measures would mean that the roots of environmental law were fixed within the WTO. MEAs would then come within the regulatory sphere of the WTO (Neumann 2001, p. 330) and no longer stand on an equal footing under international law. An extension of the negotiating mandate is neither pragmatically nor diplomatically to be recommended as a way of solving the problems.

Scope of the WTO's Dispute Settlement Body

At present, all conflicts between MEA and WTO law identified as critical in the above analysis must be handed over to the WTO's Dispute Settlement Body. If this body serving the WTO decides on matters at the cutting edge of international environmental and trade law, there is a danger of WTO hegemony over MEAs. As

we showed at the beginning, a transfer to the WTO of political legitimacy in respect of MEAs does not point towards “institutional equity” in the global political arena. Unlike in the preceding discussion of attempts to solve conflicts between WTO and MEA law, the important objective here is not a reform of GATT, GATS, TRIPS, or their annexed agreements but above all a restriction of the WTO’s Dispute Settlement Body. This requires a reform of the WTO’s Dispute Settlement Understanding, which regulates its dispute settlement procedure.

The WTO’s Dispute Settlement Body (DSB) is the strictest and most effective such body so far established in the realm of international law. Two of its characteristics are especially worthy of note. First, Art. 23 of the Dispute Settlement Understanding (DSU) enjoins member-states to refer to the DSB all disputes affecting the WTO as a result of unilateral measures. In comparison with the GATT’s dispute settlement panels, the DSB has a hugely enlarged regulatory sphere – especially by virtue of the GATS, which reaches into what were previously internal political jurisdictions. As a large number of political measures are trade-related, the DSB’s regulatory sphere is considerable: it includes measures that have been taken with reference only to an MEA, as well as all disputes connected with non-near-universal MEAs (Neumann 2001, p. 534; Marceau 2000, p. 1111). Second, enforcement of the DSB’s judgements is extremely effective. For violations of WTO law within one of the three contractual systems (GATT, GATS or TRIPS) may be punished by cross-retaliatory measures on any goods or services within one of the other contractual systems. In this way, DSB-authorized sanctions can have a direct and severe effect on a country’s economy.

The question arises whether the DSB of the WTO is the appropriate body to decide on the necessity or legitimacy of individual measures taken with reference to multilateral environmental goals. On the one hand, this is debatable from a legal point of view. The jurisdiction of a dispute resolution body, but also its procedures and the qualifications taken into account when referring a matter to its experts, may have an effect on the outcome of a dispute. In the case of the DSB of the WTO, it may be doubted whether it displays the necessary openness and competence to reach impartial decisions on a conflict of political goals between multilateral trade law and environmental law. According to Art. 3 DSU, a legal ruling should take place entirely in a WTO context; any restriction of WTO law by other relevant international law, such as that of an MEA, is excluded (OECD 1999, p. 33; Guruswamy 1998, p. 311). This narrow framework for the settlement of a dispute is in sharp contrast with Art. 23 DSU, which stipulates that all disputes affecting WTO law are to be settled before the DSB. Furthermore, Art. 8 and 17 DSU only require DSB members to be experts in trade law, not in other fields of international law and policy. Where a legal dispute touches on issues beyond trade, the panels narrowly composed of experts on trade law as well as the

WTO Appellate Body have no competence under international law to deal with matters pertaining to other areas such as environmental law. Both the DSB's lack of openness and the fact that its experts are limited to trade law suggest that it has not been empowered by member-states to take decisions outside the context of trade law.

On the other hand, it is questionable from a political point of view whether the DSB is the appropriate forum to decide on the necessity and legitimacy of measures to achieve the aims of other multilateral agreements. For the DSB's sphere of activity, as described above, seems problematic with regard to the principles of democracy and the division of powers. The rather ineffective political negotiations of member-states stand against the highly efficient legal apparatus of the DSB, especially its Appellate Body. This is a drastic discrepancy between two parallel, but largely independent, decision-making processes – a discrepancy especially apparent where there is a clash between the WTO and an MEA: on the one hand, WTO member-states are unable to achieve a political consensus on the complex relationship between MEA and WTO, since in the situations described above a (judicial) ruling on a case by case basis appears necessary; on the other hand, the DSB might find itself in the position of handing down legal judgements and thereby formulating rules that clarify this relationship. Part of the political task of weighing contradictory public values and political interests against one another would then be implicitly transferred from democratically mandated governments to the DSB. Above all, the competence of DSB members in trade law only cannot ensure a diplomatic balance between environmental and trade interests.

The problem is all the greater in that the jurisdiction of the Appellate Body largely escapes legislative control (Atik 2000). The democratic legitimacy of DSB judgements in disputes between the WTO and MEAs will therefore be fundamentally in question. This is even more problematic because the DSB is exposed to severe criticism for the lack of transparency in its proceedings⁸ (see e.g. Senti 2001). The defective democratic legitimacy of these DSB judgements should in itself pose a great danger for the sustainability of the international trade system (Barfield 2001).

⁸ Both in the jurisdiction of the DSB panels and in the deliberations of the Appellate Body, only parties to the dispute are able to attend the hearings. The records of the proceedings and the statements of these parties are not made public. The hearings take place behind closed doors. And, in the final report of the panels or of the Appellate Body, any quoted statements of position are kept anonymous. See Article 14 ("Confidentiality") and Articles 17.10 and 17.11 DSU.

Restricting the WTO

These observations suggest that the DSB is not the appropriate forum to decide on the necessity and legitimacy of measures to implement the goals, rights and obligations contained in other agreements reached under international law – even, and especially, if a measure is not explicitly provided for in the respective MEA. The DSB should therefore always refrain from legal judgements that overlap with existing law from other multilateral agreements (Roessler 2001). A demarcation between pure trade-law issues and other international legal (or political) matters cannot, however, either be defined in principle or be clearly applied during a particular case. The DSB should therefore be released from sole responsibility for the solution of multilateral (trade) disputes. This requires a reform of Art. 23 of the DSU.

The limiting of the DSB will lead a defusing of conflicts between MEAs and the WTO. It will prevent the DSB from passing judgements that go beyond its mandate and its sphere of competence. And it will reduce the “chilling effect” of the WTO, since political decision-makers in other multilateral agreements will no longer come to negotiations with the assumption that, in the event of a dispute, any political measures taken by them will be subject to WTO law. If the WTO surrenders its sole claim to responsibility for the solution of conflicts affecting trade law, this by itself will contribute to a better balance among institutions in the global political arena.

A limitation of the DSB will not, however, bring an immediate solution to potential conflicts between MEAs and the WTO. Since a solution of the critical conflicts can be found only on a case by case basis, dispute settlement structures must be found for the political-legal cases in question. Limitation of the scope of the DSB also presupposes that other important and relevant institutions can be involved in the process alongside the WTO. It is necessary to specify the actual institutions participating in the process along with the WTO, and also to clearly describe and demarcate the spheres of competence of those institutions.

In cases where environmental measures are taken with reference only to an MEA, but are not explicitly authorized by it, the central question is: which body decides whether a measure taken with reference to an MEA is *necessary* for its implementation? An answer to this question requires a (environmental) **political process** between the parties in dispute. The quest for solutions should take place within a process of cooperation between policy-makers at the WTO and those at the relevant MEA. If all parties in the dispute are members of the relevant MEA, the judgement about the necessity of a measure and, if applicable, the search for equally effective but less trade-restrictive measures should be entrusted to the

MEA negotiators (Category A1 in Table 4).⁹ Equally, in cases where one of the parties in dispute has not ratified the relevant MEA, but recognizes it as a quasi-universal MEA, the establishment of necessity may take place within the framework of the relevant MEA. MEA negotiators should therefore decide the necessity of a measure, because they have greater competence than WTO negotiators as well as greater experience in evaluating environmental measures and possible alternatives. Moreover, MEA structures are better suited to take various interests into account in the implementation of environmental goals and of the measures necessary for that purpose.

If, however, one party in a dispute questions the quasi-universality of an MEA (Categories C1, C2 and perhaps B2), another question apart from the necessity of a measure becomes central, namely: which body decides on legal-material conflicts between two agreements under international law? In such cases there is a need for a (environmental) **political-legal process** between the parties in dispute. The search for solutions should then take place in a cooperative process involving the WTO, relevant environmental institutions and an independent dispute settlement body. The necessity of a measure might be verified by the UNEP if its authority, as a UN organization, was greater than that of MEAs not enjoying near-universal recognition. International legal issues, on the other hand, should be decided either before an existing independent international dispute settlement body – the literature mentions, for example, the UNCLOS dispute settlement body (Guruswamy 1998), the Permanent Court of Arbitration (Sachs et al 2002, p. 67) or the UN Court of Justice (Neumann 2001, pp. 575 ff.) – or before a new dispute settlement body such as an International Trades Disputes Court (IFG 2002, pp. 235 f.).

Both processes would require investigation not only of the necessity in principle of a certain measure, but also of its specific formulation and application. In accordance with the introductory clause (the “chapeau”) of Art. XX GATT and Art. XIV GATS, the main issue of significance here is whether a measure might constitute a means of arbitrary or unjustified discrimination between states or a veiled restriction of international trade. For the point is to prevent the pursuit of disguised “eco-protectionism” by means of environmental measures. This investigation might take place within the WTO, since in matters of trade policy WTO negotiators or panellists have precisely the competence and experience that environmental institutions may appreciate in their particular fields. If, however, parties decide to carry out their dispute before the DSB, this necessitates a reform of the DSU. Through a change to Art. 3 DSU, issues beyond trade policy or the WTO Agreement would have to be opened up for the DSB. For, in the event of a

⁹ It would then be decided within the MEA, if necessary on a case by case basis, whether this judgement should be made through political negotiation or by persons especially appointed for that purpose within the relevant MEA Secretariat, or an independent court of arbitration.

dispute, other relevant international law would have to be taken into account, and DSB cooperation with relevant international institutions would have to be ensured.

The limited mandate of §31 (i) of the Doha Ministerial Declaration appears to make it impossible to anchor the aforementioned political-legal processes. To facilitate a solution of conflicts between MEA and WTO law, negotiations in the framework of §31 (ii) of the Doha Declaration would have to involve extremely broad cooperation between the WTO and its various bodies with other institutions, especially those of the United Nations.

The reform proposals imply a focusing of the WTO on its trade policy mandate. In accordance with the principle of institutional equity in the global political arena, the WTO would concede due freedom of action both to other international institutions and to national states. In the political-legal processes to solve conflicts between international environmental and trade law, the roles of the MEAs, the WTO and any other institutions would be of equal value. As Frederick Abbott put it in relation to the World Intellectual Property Organization (WIPO) and the WTO, such processes may lead to a horizontal distribution of responsibilities and competences among institutions best suited to handle a particular problem or part of a problem (Abbott 2003). The combination of the various competences, experiences and structures of the different institutions may result in a higher quality of decision-making. Moreover, since different interests and interest groups would be taken more into account in the solution of problems, the results may be expected to command a higher degree of acceptance. The proposed reforms would therefore probably be a step towards political stabilization of the international trade system as well as to greater democratic legitimacy and social acceptance of the WTO.

4 Impact Assessments in the World Trade Regime

As we showed at length in Chapter 2, the WTO is at present a long way from giving adequate consideration to environmental issues. Conflicts of interest among WTO member-states, especially between developing and industrial countries, appear to have become firmly stuck. In particular, developing countries seem too afraid that environmentally motivated trade restrictions may signify a new “eco-protectionism”. And, after analysis of the ten-year discussion in the Committee on Trade and Environment (CTE), it must be doubted whether the WTO is an appropriate forum in which to actively pursue environmental policy. As there has been no analysis up to now of environmental problems due to trade policy, the WTO cannot claim any expertise in solving them. This being so, an ecological reform of the world trade system “from within” represents an important and (in view of the preceding account) difficult task.

In this chapter, we shall discuss a group of instruments that might provide a new impetus to take up the challenge and to focus more sharply on environmental aspects within the world trade regime. These are instruments for the steering of decision-making processes, which may be grouped together under the heading “strategic impact assessment”. Nowadays, the term “impact assessment” is internationally understood to denote not only the methods and results of “impact analysis”, but also the political and social process that underlies the investigations and into which their results should flow (Moser 1999). So, the *strategic* character of impact assessments is crucial. With reference to a reform of the WTO, one special quality of impact assessments is that they provide information about possible economic, ecological and social consequences of trade agreements, as well as structuring the relevant processes of negotiation and decision-making. Impact assessments may thus, in many respects, offset or at least reduce the deficits that we pointed out in Chapter 2. The concepts considered in the present chapter are intended especially – though not exclusively – to optimize environmental interests.

The current debate on impact assessments

Impact assessments are today used in a broad political framework to investigate the most diverse problems and aspects. According to the focus of the investigation, they are spoken of as “environmental”, “gender”, “climate”, “health”, “biodiversity” or “social” impact assessments.

Stemming from new demands that globalization and other processes have placed on impact assessments, the scientific and political worlds have needed to adjust the instruments from the point of view of content and method as well as conception and organization. The content has been expanded mostly with reference to the model of sustainable development, by integrating ecological, economic and social criteria. In terms of a balanced account of all these aspects of sustainable development, however, we can say that “integrated” or “sustainability” impact assessments have been more the exception than the rule (Verheem/Tonk 2000). Sustainability impact assessment is one approach of this kind, and we shall look at it more closely in this chapter. Another interesting concept for the spatial and temporal expansion of impact assessments has come out of the Global Environment Assessment project at Harvard University, whose all-embracing approach offers valuable ideas especially in relation to globalization processes and global environmental effects (Cash/Clark 2001; Moser 1999). In contrast to the often strongly technological and methodological conceptual focus, more recent approaches have nearly all stressed the necessity of adapting the instruments to the relevant processes and institutions and of taking into account the respective scientific, political and social contexts (Sheate et al. 2001). We should mention here especially the concept of “Analytical Strategic Environmental Assessment” (ANSEA Network 2002).

Status quo and future potentials

The WTO is today seen as the central forum of the world trade system. As the globalization of trade has not only economic but inevitably also social and ecological effects, trade impact assessments also investigate economic, social and ecological effects.¹⁰ Their focus is not only on the impact of international trade, but above all on its extent and distribution among various social groups, regions, countries, sectors and ecosystems. The higher aim here is to accord social and ecological aspects an appropriate value in decision-making processes in a mainly economic context, as well as to avoid or counterbalance all foreseeable negative consequences (cf. George et al. 2001).

Impact assessments have not yet been applied within the WTO. As we saw in Chapter 2, there has been some consideration of the effects of environmental agreements or measures upon the world economic system. But the effects of international trade or trade agreements on the environment have not up to now been closely examined. Canada, the EU and the United States have announced that they intend to carry out a “trade impact assessment” in future rounds of WTO negotiations (see CTE 2000), but their approaches differ considerably in respect

¹⁰ A series of intergovernmental institutions already have at their disposal concepts for such a trade impact assessment. Thus, we have “integrated assessment” (UN), “integrated assessment” (OECD) and “environmental assessment” (World Bank), which have each been especially developed for the respective organization and decision-making process.

of aims, methods and field of application.¹¹ The impact assessment first conducted in Canada in 1994 is essentially an *ex post* evaluation of the Uruguay Round referring exclusively to its ecological impact within Canada (AES 2001). The aim of the model currently being developed in the EU is an *ex ante* assessment of future WTO agreements, including sustainability aspects at a global level. And in the United States, at a rather more formal level, the focus is on the impact that agreements are likely to have on the country's existing environmental laws and regulations (CTE 2000).

In comparison with these approaches at national or regional level, impact assessments offer far greater scope if it is directly integrated into the structures of the WTO. A truly *strategic* impact assessment would identify negative and positive effects in advance of agreements (not only in connection with ratification), and would input those effects into the relevant decision-making processes. It would not only be conducted at the level of national states, but would cover international trade as a whole and perhaps also consider the global cumulative effects and long-term consequences of certain decisions. With their basic aim "of identifying the future consequences of a current or proposed action" (general definition of "impact assessment" used by the International Association for Impact Assessment: www.iaia.org), impact assessments usually follow the precautionary principle and in their way support the proposal to integrate it more strongly into the world trade regime. They might also help to ensure that future studies consider not only the impact of conservation measures on the multilateral world trade system, but also the environmental consequences of a further liberalization of world trade. Environmental problems would then no longer be handled only within the CTE, but might be taken up also at ministerial level, for example. Recognized research methods may furthermore give a scientific underpinning to any possible need for trade restrictions, and therefore meet the WTO's requirement for scientifically grounded proof of their necessity.

Finally, impact assessments provide the public with easier access to information about the possible consequences of trade agreements, since they often make known and discuss alternative courses of action as well as weighing up ecological, social and economic factors in relation to one another. Impact assessments also promote the active participation of stakeholders, so that they may contribute to greater participation and transparency in the WTO's negotiating processes and at least in this respect improve its relations with civil society. In terms of conceptual approach and programme for action, therefore, impact assessments offer a series of possibilities for the "ecologization" of economically oriented decision-making processes and hence also for an ecological reform of the WTO.

¹¹ The terms used to describe the instrument are not at all uniform: "strategic environmental assessment" in Canada, "sustainability impact assessment" in the EU, and "environmental review" in the USA.

Sustainability impact assessment: the European approach

In view of this potential of impact assessments, it is not surprising that much is expected of this set of steering instruments in international trade and environmental policy. We should distinguish, however, between the theoretical possibilities and the actual prospects of following them through. Optimum political and legal conditions are often assumed in the theoretical discussion of policy control instruments. The concepts implicitly rest upon a number of assumptions, from the technical-scientific measurability of consequences to the possibility of actually avoiding or lessening negative effects. A lot is expected of those involved in the process: specialist knowledge as well as political interest and a willingness to participate and cooperate.

In order to distinguish between the theoretical potential of trade impact assessment and the actual chances of success, and to make a critical examination of different approaches, we shall refer in the following sections to a number of quality criteria. These concern not only the content and form of the instrument but also to the form of the decision-making process and the integration of various groups of players. A list of criteria has been developed by the International Association for Impact Assessment (IAIA).

IAIA performance criteria

The IAIA describes as follows the potential of strategic impact assessment: “A good-quality Strategic Environmental Assessment process informs planners, decision-makers and affected public on the sustainability of strategic decisions, facilitates the search for the best alternative and ensures a democratic decision-making process” (IAIA 2002).

To satisfy this demand, the IAIA has developed the following performance criteria for the process of Strategic Environmental Assessment; they can also serve as the basis for the evaluation of concepts of all impact assessments.

For this purpose, a good-quality assessment process SEA is...

1. Integrated

- Suitable investigation of all strategic decisions
- Consideration of ecological, social and economic aspects and their interaction
- Proportionality of investigative methods and strategic levels of decision-making process

2. Oriented to model of sustainable development:

- Identification of most sustainable alternatives

3. Focused:

- Sufficiently reliable and useable information for planning and decision-making process
- Most important aspects for sustainability (selectivity)
- Cost and time effectiveness

4. Transparent and binding:

- Responsibility of respective institution for assessment and decision-making process
- Professionalism, fairness, impartiality, balance of groups and institutions participating in the process
- Independent evaluation and monitoring
- Report on consideration of sustainability aspects

5. Participatory:

- Imparting of information and inclusion of interested and affected members of public, relevant authorities and other organizations
- Explicit presentation of all interests and considerations in documentation of the decision-making process
- Preparation of clear and easily intelligible information

6. Iterative:

- Results of investigation available at each stage of planning *before* decisions are made
 - Sufficient information available on expected consequences of each decision

Theoretical demands and practical implementation

Since 1999 the Manchester Institute for Development Policy Management (IDPM) has been designing, testing and optimizing a Sustainability Impact Assessment (SIA) approach for the European Commission, and in the meantime it has also been applied in practice. The European Commission will use this instrument as a basis and support for European negotiating positions in the WTO Round in September 2003 in Cancun (Mexico) – for example, in its arguments for an agreement on investments (see Pettinato 2003; WTO 2003).

In the IDPM conception, SIA takes place in an integrated, focused and iterative process and takes account of crucial performance criteria (see criteria 1,2,3 and 6). The requirement that the process should be accountable and participatory (criteria 4 and 5) is not, however, mentioned in presentations of the instrument (George/Kirkpatrick 2003). Now, what about the claims and the reality of the concept? Does the IDPM approach stand up to the quality criteria? How can the instrument be further developed?

In the SIA approach developed by the IDPM, in a multi-stage process first the areas that are important from the point of view of sustainability are identified (*preliminary assessment*). These areas are then further investigated through methods and procedures specially adapted for a full SIA. The development and completion of this preliminary assessment are described in the IDPM programme as Phase I and Phase II of the SIA project. Detailed studies specific to particular groups of countries and economic sectors then follow in Phase III. Given the present state of the programme, we shall here mainly concentrate on the so-called preliminary assessment.

This first stage of the SIA has already been performed in the framework of the Doha Round, where a “Preliminary Overview” of the potential sustainability impact of the Doha agenda is available to the European Commission in the form of a final report (George/Kirkpatrick 2003). This contains preliminary assessments for agriculture, services, intellectual property and other affected areas, and concludes with recommendations for deeper studies specific to each sector.¹²

To identify the areas for which a full SIA is recommended, the preliminary assessment takes three possible scenarios (*baseline*, *intermediate* and *liberalization*) and roughly considers their economic, ecological and social effects with reference to nine core sustainability indicators (Kirkpatrick et al. 1999; George/Kirkpatrick 2003). The baseline scenarios start from the “baseline” in 1995 after the Uruguay Round and constitute the opposite pole from the full-scale liberalization scenarios. The EU negotiating position is in each case represented by the intermediate scenario (CTE 2000). The nine core indicators are divided into three economic, three social and three ecological indicators. The investigation of these factors draws on procedures and methods (e.g. cost-benefit, material flow and chain-effect analysis) already familiar from existing models of impact assessment. The negative and positive effects to be expected in the various areas are divided into strong (=+/-2) and weak (=+/-1).

The course of a preliminary assessment

SUSTAINABILITY IMPACT ASSESSMENT <i>- preliminary assessment -</i>		
Screening Identification of all agreements to be considered		
Scoping Identification of all aspects significant for the study		
Szenarienanalyse		
<i>Baseline</i>	<i>Intermediate</i>	<i>Liberalization</i>
Sustainability indicators (per scenario)		
economic indicators	social indicators	ecological indicators
<ul style="list-style-type: none"> • average real income • net fixed capital formation • employment 	<ul style="list-style-type: none"> • poverty • health and education • equity 	<ul style="list-style-type: none"> • biodiversity • environmental quality • natural resource stocks
Scale for strength of negative and positive effects -2 / -1 ← 0 → +1 / +2		
↑ Analysis of enhancement and mitigation measures ↑		

Based on Kirkpatrick et al 1999 and George/Kirkpatrick 2003.

¹² Individual studies already exist on market access, environmental services and competition.

Critical evaluation of SIA theory and practice

Criticism of the current SIA approach and proposals for its improvement and implementation have come mainly from various NGOs (e.g. WWF, Oxfam, Save the Children and ActionAid; see Richardson 2000). Informed about new developments, these NGOs have commented on methods and procedures and contributed, through suggestions and criticisms of their own, to the implementation of the instrument.

Before any critical evaluation, and mainly with reference to the problem areas described in Chapter 2, it should be stressed that these comments have welcomed the European Commission's ambitious project of integrating sustainability aspects into policy formulations concerning international trade, and given a generally positive assessment of the way in which impact assessments address the problems. The NGOs in question have also concluded that SIAs are an appropriate tool to make the EU's decision-making on trade policy more transparent and accountable. Nevertheless, they do make some criticisms of the present conception and implementation of SIAs, with regard both to the underlying theoretical assumptions and to the enhancement and mitigation measures derived from the SIA process.

The first criticism concerns what may be termed the "pro-liberalization bias". The SIA approach starts from the assumption that trade liberalization measures have a positive effect on international trade, that trade is necessary for economic growth, and that growth in turn should be viewed positively in terms of environmental protection (Richardson 2000). Trade and trade liberalization measures are not in themselves called into question. There can therefore be no serious testing of alternatives or of a zero option (baseline scenario). And so, the present conceptions of SIA do not consider options that involve less trade liberalization or none at all. Identification of the most sustainable option cannot therefore be consistently pursued (see criterion 2).

A research perspective channelled in this direction ultimately has an effect on the whole process of impact assessment. Thus, up to now all scenario analyses have confirmed the *intermediate scenario* that the EU prefers to adopt in negotiations. On the basis of the IAIA criteria, the current conception should also be criticized for giving civil society players little scope to influence the implementation of SIAs. It is true that a positive emphasis can be placed on the participation of various NGOs in the conception process. Up to now, however, there has not been enough support for the participation of other stakeholders, beyond these selected groups, in the practical development of SIA (see Criterion 5; Parker 2000).

Finally, a number of criticisms bear on the final conclusions of the investigations and on the recommendations for action based on the SIA process. SIA is more than an "academic exercise". After all, one of its main aims is to develop

recommendations for the practical implementation of the relevant trade policies. Up to now, however, recommendations for compensation have never referred to the WTO's or EU's trade policy but have always invoked the responsibility of the trading partners and therefore fallen heaviest on other countries and regions. This calls into question the credibility and accountable character of SIAs (see Criterion 4) and threatens to intensify the rejection and resistance of developing countries in relation to the instrument. Apart from the unequal distribution of additional compensatory measures, SIA has hitherto offered no instructions or assistance for implementation of the resulting recommendations for action. At the same time, in the practical application of SIAs, measures of enhancement and mitigation have far greater significance than theoretical objectives and requirements would lead one to expect. It looks as if it will be necessary to keep to ameliorative measures, since SIA is functionally very limited and is in no position to identify sustainable options for international trade agreements.

At its present stage of development, then, and however welcome are its theoretical approach and ambitious goals, the SIA concept remains open to a number of criticisms. It is therefore a problem that the European Commission is currently arguing that its proposed framework for direct foreign investment may be given a sustainable form through the deployment of SIA (see Pettinato 2003). Many NGOs fear that SIA might here be simply misused to support European negotiating positions and to "greenwash" the new investment agreement – a fear which, in view of the criticisms presented above, is not going to be easily removed. Criticism should therefore be taken seriously in the further development of the instrument.

Recommendations for the further development of Sustainable Impact Assessments

The distortion of the SIA process by the pro-liberalization bias should be strongly opposed, so that genuinely alternative options with the greatest possible sustainability can be identified. The best way of ensuring this is through reliable, effective integration and participation of affected stakeholders. Methodological improvements are also advisable – for example, the introduction of multiple scenarios or the use of several sets of indicators that can be flexibly applied.

Table 3: Recommendations for the Further Development of Strategic Impact Assessment

Criterion	SIA today	Recommendations
integrated	<ul style="list-style-type: none"> + integration of ecological, economic and social aspects - no integration into the trade agreement policy process - disproportionality of methods and strategic levels (e.g. scenario analyses) 	<ul style="list-style-type: none"> • appropriate investigation of <i>all</i> strategic decisions • proportionality of investigative methods and strategic level of decision-making process
sustainability-led	<ul style="list-style-type: none"> + ecological, economic and social dimensions of sustainability - no identification of most sustainable policy option (pro-liberalization bias) 	<ul style="list-style-type: none"> • greater priority for identification of most sustainable policy option than for trade liberalization and WTO compatibility <p>--> abandonment of pro-liberalization bias</p>
focused	<ul style="list-style-type: none"> + multi-stage procedure 	<p>--> abandonment of pro-liberalization bias</p>
accountable	<ul style="list-style-type: none"> + professionalism through experts from diverse institutions - suspected deficit of fairness, impartiality and balance - lack of transparency in methods and procedures 	<ul style="list-style-type: none"> • improvement and guaranteeing of professionalism, fairness, impartiality and balance of groups and institutions involved in process; • compulsory, continuous and independent: monitoring and evaluation; • consideration of sustainability aspects and interests of affected players
participative	<ul style="list-style-type: none"> + broad participation of NGOs and other players in conception process; - lack of mechanisms to ensure stakeholder participation in all phases of SIA 	<ul style="list-style-type: none"> • broad, systematic information and participation of stakeholders in whole SIA process; • provision of clear and intelligible information; • explicit presentation of all interests and considerations in documentation of decision-making process
iterative	<ul style="list-style-type: none"> + division into several phases with more general and more specific methods; - strong focus on analysis of compensatory measures 	<ul style="list-style-type: none"> • provision of study results before relevant decision; • consideration of all quality criteria in all phases up to including implementation of trade policies

All in all, trade agreements should have a “sustainable” form at the time of their formulation and not merely be flanked by sustainable compensatory measures. What really corresponds to the precautionary principle is the avoidance of negative effects, not compensatory measures taken after the event. Nevertheless, enhancement and mitigation measures (clearly understood as secondary options) should also be ensured and supported.

In conclusion, it should be stressed that SIA is an instrument whose effectiveness greatly depends on the actors in the field. Its acceptance is therefore a necessary condition for it to achieve its potential. There is a danger that, if the European Commission does not take the above criticisms seriously in its further elaboration of SIA, the whole programme will degenerate into an expensive “greenwash” and rapidly lose public support.

Reforming the WTO

In its approach and principles as well as its methods and procedures, both impact assessments in general and the European Union’s own SIA initiative in particular can contribute to an ecological reform of the WTO. Through the identification of possible environmental consequences and the input of information into international trade talks, it offers ways of rooting the precautionary principle more firmly in the world trade regime and of making the negotiation and decision-making processes more democratic and transparent.

With regard to an “internal” reform of the WTO, it is especially interesting to discuss how such impact assessments might be transferred to the WTO as a whole. This raises the question of how the instrument and its investigative results can be effectively integrated into the structures and processes of the WTO, so that they support them in the direction of their self-declared goal of sustainable development. The use of impact assessments should therefore be seen as “work in progress”. It seems legitimate that experience should first be accumulated with different instruments and conceptions, on the basis of which appropriate reform approaches can be tested and perfected. Just as there should be further scientific development of the instruments, so should constructive criticism and discussion of their limits and possible dangers be encouraged.

We shall now consider two interesting approaches that should stimulate further discussion of integrated forms of impact assessments: namely, incorporation into an already existing body, the Trade Policy Review Body; and development of new structures through the creation of a Strategic Impact Assessment Body. Whereas the first of these proposals mainly looks to impact assessments at national level and only considers existing trade agreements, the second proposal, which would involve *ex ante* impact assessment of agreements at WTO level, implies a

considerably broader variant of impact assessments. The two are not mutually exclusive, however. Complementary or mutually supportive procedures are just as conceivable as separate ones.

Integration into the Trade Policy Review Mechanism

If impact assessment is to be integrated into existing WTO structures, the most suitable framework would seem to be the so-called Trade Policy Reviews (TPRs). These have been conducted at national level since 1995. Both individual member-states and the WTO Secretariat of the TPR Body compile regular reports especially on the implementation of WTO agreements by member states, the macro-economic and structural context of trade policies, and the effects of national economic reforms on international trade and multilateral, bilateral and unilateral trade initiatives. The two kinds of report are then eventually discussed by all WTO members within the TPR Body. Trade Policy Reviews mainly serve as communication mechanisms between the WTO and its member-states. They are supposed to strengthen WTO control over its members and to ensure the smooth functioning of the world trade system (1999 USTR Annual Report 2000; Borrmann/Koopmann 2002).

Apart from the topics already mentioned, there have been repeated calls for TPRs to be opened up to ecological and social interests (e.g. IISD 1996). As the discussion on basic labour standards makes clear, aspects without direct reference to trade might also become a fixed component of TPRs, regularly investigated and discussed within the TPR Body (1999 USTR Annual Report 2000). Up to now, however, the discussion on the integration of international workers' rights has run up against almost united resistance from developing countries (Borrmann/Koopmann 2002).

Trade Policy Reviews might survey not only the impact of national environmental requirements on free trade, but also the impact of international trade agreements on national ecological and social interests as well as aspects of development policy (Schweisshelm 2003; Borrmann/Koopmann 2002). Apart from the WTO's exclusive control over the observance of WTO rules, TPRs are already today seen as a way for member-states to evaluate its trade policies and to uncover consequences for the environment and society. Thus, for example, the TPR set up by Sri Lanka back in 1995 gives detailed consideration to environmental consequences of trade policies and ways of dealing with them. But this integration of environmental aspects still only occurs on an individual and voluntary basis.

Impact assessments should be integrated into the Trade Policy Review Mechanism, so that the environmental consequences of trade agreements are investigated both by member-states and by the WTO Secretariat. The results of such investigations should then enter as a firm component into the discussion of TPRs and, like other aspects, become a theme for debate both at national level and at WTO ministerial

level. The information acquired would provide member-states with information for use in further WTO negotiations and might thereby enlarge their capacity to exert influence and take action. Another result would be greater transparency vis-à-vis civil society, since the newly identified consequences as well as the investigative methods and procedures would be made available to the public.

It may be assumed that impact assessments could be more easily integrated into structures that already exist. However, incorporation into the TPR Mechanism would also mean direct dependence on its effectiveness and status. What would be the consequences of this organizational link for the political effectiveness of the instrument? The TPR Body is not connected with the Dispute Settlement Body and has no power of its own to impose sanctions. TPRs do not serve to enforce WTO rules, nor are they supposed to be a means of exerting pressure in disputes. It is quite common, however, for information from TPRs to be used in dispute procedures among others (Borrmann/Koopmann 2002). The identification of negative ecological or social consequences might provide arguments where barriers to trade have become an issue before the Dispute Settlement Body. They might also help to review and correct after the event any already agreed trade rules (cf. Borrmann/Koopmann 2002).

Much as in the discussion on the integration of core labour standards into TPRs, the resistance of developing countries is also to be expected in relation to the integration of environmental aspects. Trade impact assessments already sometimes run into fierce criticism, since its specific goals and scope appear as unclear as the question of what should happen with the data that have been collected. There is a fear that a “one size fits all”-approach might have negative effects for the market access of these countries (Jha 2000, p. 387). In countering this scepticism, the main question to be raised concerns the scientific, financial and personal capabilities necessary for the carrying out of extensive impact assessment at national level. Implementation at the level of individual countries would presumably entail a considerable reallocation of resources within the TPR Body and increased funding especially for developing countries. The need for technical assistance from institutions or authorities executing the project would not be limited to financial support, but would also involve help with content, design and methodology in terms of extensive “Capacity Building for Impact Assessment”, as the IAIA stressed in its declaration on its 2003 international conference.¹³

Establishment of a Strategic Impact Assessment Body

Apart from dependence on the effectiveness of the TPR Body, there are two other ways in which the organizational link to the existing TPR Mechanism would limit impact assessments. First, because of the TPR’s control function, studies would

¹³ See www.iaia.org on “IAIA ’03 Conference: Building Capacity for Impact Assessment”.

always be made only *ex post*, after ratification of trade agreements. Second, the fact that the study is spatially limited to individual countries would be a defect, especially in view of the cross-border nature of environmental interests. It is quite conceivable that TPRs would take in areas that were not yet officially regulated by the WTO, and that there could be collaboration beyond national frontiers. But since it would presumably be difficult to achieve such a fundamental shift in the TPR Mechanism, the establishment of a new and independent Strategic Impact Assessment Body (“SIA Body”) should be discussed.

An SIA Body might be structured in such a way as to promote the development and functioning of comprehensive *ex ante* impact assessment. Such a body should be given a place at the level of the General Council, along with the TPR Body and the WTO’s Dispute Settlement Body. In this way, impact assessments would not start at national level and then be fed into the TPR Body or the ministerial level, but would be directly conducted at the level of the General Council. An official link to UNEP or CSD would become conceivable.

It is true that the SIA Body might act in similar ways to the TPR Body, but its task in relation to trade agreements would not be to check whether and how these were being implemented by member states. Rather, at a relatively early stage before the conclusion of a trade agreement, it would investigate the likely ecological and social consequences so that information about these could be input into the decision-making and negotiating processes and eventually into the agreement itself. These impact assessments would not necessarily be conducted at the level of individual countries, but might take place at different spatial levels appropriate to the particular theme and the scale of the likely consequences: national, regional or global.

The SIA Body should carry out impact assessments independently and on its own initiative, though also at the request of individual member-states, for all areas of WTO negotiations. After a preliminary assessment, it might concentrate on cases that appear especially important for environmental and/or social reasons. There would therefore be scope for it to investigate differences that might appear between industrial and developing countries – for example, where a problem is viewed in terms of “eco-protectionism” versus “environmental dumping”.

Ideally, this would be complemented by impact assessments at the level of individual member-states (e.g. Canada or the EU). Then the tasks of the SIA Body, as of the TPR Body, would be to structure and systematize these individual reports, to provide assistance with design and organization, as well as financial and technical support, to collect together the individual reports, and to present them for discussion at ministerial level. An SIA Body might thus actively influence multilateral trade agreements in the direction of sustainable development, and help to prevent false developments in advance.

5 Reforming and Restricting the WTO

Free trade policy and its impact on the environment – a dark chapter

As its preamble states, the aim of the WTO is to pursue not only trade liberalization but also sustainable development. In the policy statement of the WTO's fourth ministerial conference, held in Doha, Qatar, this was again spelled out: "We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement" (WTO 2001b, § 6). Thus, the WTO's free trade policy is a means to an end and can be measured by its own goals. Up to now the WTO has pursued the goal of sustainable development without much idea of the actual consequences of its policy. As the analysis of the WTO's internal discussion of environmental issues has shown, the environmental effects of the WTO Agreement have so far been ignored at the level of policy-making.

The reason for this is the limited mandate of the responsible bodies, the Group on Environmental Measures and International Trade (EMIT Group) and the Committee on Trade and Environment (CTE), which are supposed to keep to the effects of environmental measures on trade policy; they pay little or no attention to the effects of trade policy on the environment. An additional factor is that many environmental issues are in fact also discussed in other WTO forums, where environmental interests have deliberately been given no role on the grounds that the whole question is supposed to have been transferred to the CTE. Furthermore, differences of opinion between WTO member-states, especially between industrial and developing countries, have proved to be obstacles to a comprehensive analysis and discussion of possible solutions.

Just as there has been little policy discussion of environmental effects, decisions about further liberalization measures have been made independently of scientific investigation of their possible environmental impact. No mention can be made of such investigations, nor do policy-making processes involve systematic assessment of that impact. This is not easy to understand, since the question of whether free trade has a positive or negative effect on the environment has by no means been resolved. True, many theorists admit that environmental protection and free trade do not necessarily exclude each other. But numerous examples can be mentioned where world trade has had a negative impact on the environment. It is not possible to assume from the outset that free trade and environmental protection are in principle mutually supportive. Empirical studies need to be made of individual cases.

The fact is, however, that empirical studies of the social and ecological effects of free trade are still in their early days. As the discussion of impact assessment has shown, the existing programmes still have major defects that impair their significance and effectiveness. Critical examination of the EU's Sustainable Impact Assessment has made it clear that, even in this advanced programme, there is a need for considerable further methodological development of the instrument. The criteria of "participation" and "transparency" present a particular challenge here. It has also been shown that Sustainable Impact Assessments currently betrays a pro-liberalization bias. In order to make an objective impact assessment of international trade policy, it would be necessary to consider a fundamental turn away from existing paradigms of free trade. Otherwise, for structural reasons, the instrument can apply only to recommendations for compensatory measures after the event. Identification of the most sustainable alternatives to a free trade policy is just as little discussed as the precautionary prevention of negative consequences.

Apart from these defects, it must also be clarified how the results of investigations can be most effectively input into negotiating processes. As we have seen, trade impact assessments are at present conducted on a large scale only in the USA, Canada and the EU. The status that their findings should have in the WTO's policy process is as unclear as the degree to which they command acceptance on the part of other WTO countries.

Because studies of the actual environmental effects of world trade policy have been neglected, the WTO has for more than ten years been subject to intense criticism from various groups within civil society. Since the Seattle demonstrations in 1999 vigorous demands have been raised for a moratorium on further liberalization measures, and yet no moves have so far been made to systematically assess their likely social and ecological impact. The WTO has thus done little to answer criticism that it is obstructing the goal of sustainable development. A first step in this direction would be to rationalize WTO policy negotiations by giving them a solid scientific foundation.

Rationalizing the WTO's policy-making process

Whereas the WTO's system of regulatory laws has been quite clearly defined, there are scarcely any mechanisms tying its policy to scientific knowledge (cf. Charnovitz 2003). Many Multilateral Environmental Agreements, for example, have at their disposal bodies which integrate the results of current studies into policy negotiations, make it easier for decision-makers to consult independent scientific advice in parallel to the actual negotiating process, and subject the results of political agreements to scientific examination. The most impressive example of this kind is the Intergovernmental Panel on Climate Change, which provides the scientific basis for the UN Framework Convention on Climate

Change and the Kyoto Protocol. In contrast, the WTO's institutional structure entirely lacks mechanisms and bodies tying its policy to scientific knowledge.

Impact assessments represent a twofold opportunity for rationalizing the WTO's decision-making and negotiating processes. First, the simple acquisition of new information about possible negative and positive consequences of trade liberalization creates a more objective and rational basis for the taking of decisions. Impact assessments offer a platform for identifying the effects of international trade policy on the environment and therefore lead to greater consideration for the precautionary principle. At the same time, the systematic application of impact assessments means that the public and representatives of institutions of civil society, as well as other stakeholders, can actively participate in the discussion about impact, alternatives and compensatory measures. Along with the rationalization of policy decisions, therefore, impact assessments promise to make the negotiating process more transparent and democratic. It offers an opportunity to make WTO negotiations more sensitive to social and ecological interests, and to support those interests by contributing to sustainable development. We therefore recommend that WTO policy negotiations should be accompanied with impact assessments.

This requires institutional mechanisms that effectively link studies and study results into the negotiating processes. In this paper, two proposals have been put forward in this connection. One way of rooting impact assessments in existing WTO structures is through their integration into the Trade Policy Review Mechanism. With an expansion of both content and programme, Trade Policy Reviews might provide the framework for, among other things, systematic clarification of the environmental impact of trade agreements within individual countries, and for discussion of this to be tabled in the Trade Policy Review Body and at ministerial level. New knowledge about the environmental consequences might then lead to corrections in existing trade agreements. The arguments provided through impact assessments might also suggest additional environmental measures and, where necessary, enlarge the scope for action on the part of individual countries in relation to the obligations arising out of WTO agreements.

Since impact assessment is an *ex ante* process, however, it should take place before policy decisions and contribute to discussion of them. Hence, in addition to the tying of strategic impact assessment into the WTO's Trade Policy Review Mechanism, consideration should be given to the establishment of a special Impact Assessment Body. Such a far-reaching institutionalization of impact assessments might allow information about possible consequences to be ascertained already in the run-up to future negotiations and to be input into the policy process. Studies might, as required, take place at different spatial levels (national, regional, global) and apply the appropriate investigative methods in each case.

Both variants make it possible for member-states to bring their knowledge about possible consequences to bear in negotiations, and to use the results of the assessments in arguing for their interests. A prerequisite for effective institutionalization, however, is acceptance of the instrument as well as understanding of its methods and approach. Here the broad involvement of stakeholders in general, and developing countries in particular, plays an especially crucial role. Stronger “capacity building” will in future be exceptionally important, to take the edge off scepticism concerning “eco-protectionism” and to increase the potential of strategic impact assessments. Another aim must be a fair distribution of the assessment costs.

If the aims and potential of impact assessments are recognized and supported, the instruments offer a systematic and effective approach to the goal of sustainable development within the world trade regime itself. But, so long as sustainable development continues to be no more than an empty formula in the WTO preamble, integrated approaches such as Sustainable Impact Assessment stand little chance of gaining broad political recognition. It is essential to prevent the misuse of such instruments to “greenwash” trade policy or to legitimize “eco-protectionism”.

In the current Doha Round, there have been no specific negotiations in the WTO on how to handle impact assessments. Both before and after the Ministerial Conference in Cancun, talks on a further liberalization of world trade have proceeded without heed to its ecological impact. Yet, as the IISD among others has proposed, § 51 of the Doha Declaration might create some scope for the integration of impact assessments, since talks have been agreed “to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected” (see Yu 2003). The key task defined under § 51 might thus open a window for rethinking.

Free trade policy and the WTO: a hegemonic institution

The scope and limits of the instrument known as Impact Assessments show how hard it is to achieve a systematic scientific assessment of the social and ecological consequences of WTO trade policy. The fact that environmental effects are not yet even an issue within the WTO places at least a question mark over its contribution to the goal of sustainable development. As the various dimensions of sustainable development do not all have the same weight in the WTO’s decision-making processes, care should be taken to ensure that it allows other institutions charged with these objectives to have the proper leeway for action.

As we have seen, the distinctive approaches of the various international policy institutions are not always compatible with one another. Yet all international institutions – regardless of their underlying logic, values, objectives and mechanisms – are legitimated in similar ways through consensual agreements of the international community. In the tangle of conflicting interests, it is the task of politicians both to maintain these institutions in their diversity and to coordinate them with one another. “Only a balance among a plurality of institutions will guarantee a balance between a plurality of objectives, be they social, environmental or economic ones” (Sachs et al. 2002, p. 65). It is therefore essential to guarantee *institutional equity* in the global political arena.

As to the relationship between the WTO’s regulatory system and Multilateral Environmental Agreements, it was shown how far the WTO threatens their operational leeway. The classification of potential disputes into major and minor showed that the legal wording of some environmental agreements that clash with the WTO poses fewer problems than one might have thought. But what happens if a country has not signed an environmental agreement and lodges a complaint with reference to WTO rules? And what if a country introduces trade measures with reference to an environmental agreement that does not explicitly provide for such measures?

In the case of environmental agreements which do not provide for directly restrictive measures on trade, or which have not been ratified by all affected parties, disputes cannot directly arise out of the legal wording of a text. If, for example, a country introduces trade restrictions by referring to a particular agreement, but that agreement does not explicitly authorize such measures, the resulting dispute can be settled only on an individual basis. The key question for the relationship between Multilateral Environmental Agreements and the WTO is therefore which body should settle a dispute that can be decided only on a case by case basis.

Under existing law, the WTO and its Dispute Settlement Body have sole claim to settle such disputes. This reach of the Dispute Settlement Body is extremely problematic, however, since it basically involves a position of political power. It hands over to the WTO’s Dispute Settlement Body a responsibility that belongs with democratically legitimated parliaments – the responsibility of mediating and deciding among conflicting interests and values. The guideline that the Dispute Settlement Body should settle disputes only in the context of the WTO Agreement further underlines the unsuitability and insufficient mandate of that body for the political task in question. Handing over the resolution of disputes between Multilateral Environmental Agreements and the WTO to the WTO’s Dispute Settlement Body Institutional does therefore not further an institutional equity in the global political arena. It rather threatens to make the WTO an institution exercising hegemony over environmental agreements.

Creating a balance between environmental and trade institutions

There has been talk for some time now of enhancing the status of environmental institutions, so that a better balance may be struck between global environmental and economic institutions. Proposals to upgrade UNEP to a Global Environmental Organization have come up for debate, as have recommendations to improve the political efficiency of Multilateral Environmental Agreements. While these strategies appear meaningful in many respects, they do not constitute a remedy for the problems under discussion here. The upgrading of environmental institutions will not help if the WTO can limit their scope for action by means of legal judgements of its Dispute Settlement Body and follow these up with severe trade sanctions. For an upgrading of environmental institutions leaves untouched Article 23 DSU and the WTO's sole claim to resolve conflicts in the domain of trade related issues.

A limitation of the mandate of the WTO's Dispute Settlement Body is therefore required for the resolution of conflicts if other international institutions are touched. It will prevent that body from taking decisions which go beyond its competence. It will reduce the "chilling effect" of the WTO, since other multi-lateral agreements will no longer be negotiated against the background that any legal dispute will be settled by WTO law. A limitation of the WTO's Dispute Settlement Body also presupposes that, in conflicts between environmental and trade law that can be settled only on an individual basis, there must be stronger cooperation among all the institutions concerned.

On the other hand, the possibility will be opened for individual states to settle disputes through political-legal processes. Along with the WTO, and according to the case in question, this should involve the secretariats and ministerial conferences of Multilateral Environmental Agreements, UNEP, and an independent body for the administration of justice that is more open in terms of international law. In such cases, a clear demarcation of responsibilities is indispensable. It has been proposed that environmental institutions (MEAs, UNEP) should be the ones that establish the environmental *necessity* of a measure to fulfil obligations resulting from an environmental agreement. The specific *application* of the measure – for example, whether it represents a disguised trade barrier or arbitrarily discriminates between countries – might then be investigated by the WTO from the point of view of trade policy. Finally, points of international law should be resolved in cooperation with an independent dispute settlement body. The combination of different competences, experiences and structures ought to bring a higher quality to the decision-making and a greater acceptance of its results. Abandonment of the WTO's sole claim to resolve conflicts, together with horizontal distribution of responsibilities and competences among different institutions, would also lead to a better balance among institutions in the global political arena.

Since the problems between Multilateral Environmental Agreements and the WTO do for the most part not seem to lie in the incompatibility of legal texts, the current negotiations under §31 (i) of the Doha Declaration do not offer a solution because of the limited negotiating mandate. Even a widening of the mandate would not hold out the prospect of a solution, as the kind of disputes in question can be resolved only on an individual basis. The WTO should not carry this out on its own initiative, but should work together with the appropriate environmental institutions. For an unlimited and transparent cooperation among international institutions is the minimum requirement for institutional equity in the political arena.

Both the negotiations under §31 (ii) and the negotiations to revise the Dispute Settlement Understanding under §30 of the Doha Declaration might open a window for rethinking. But they are a long way from offering a solution to the problems laid out here. For, in the prevailing understanding of the matter, the negotiating mandate under §30 is limited to technical and procedural refinements of the Dispute Settlement Understanding, while negotiations in the framework of §31 (ii) are only supposed to formalize the exchange of information between Multilateral Environmental Agreement secretariats and WTO bodies. First, then, a link would have to be created between work on revising the Dispute Settlement Understanding and negotiations on conflicts between Multilateral Environmental and WTO law, in order to bring about the required limitation of the mandate of the WTO's Dispute Settlement Body. Second, with regard to negotiations under §31, the objective should be a degree of cooperation between the WTO and other institutions (especially those of the United Nations) that goes far beyond the mere exchange of information. This might then be used to establish political-legal processes between relevant environmental institutions and the WTO for the purpose of solving conflicts between Multilateral Environmental Agreements and the WTO.

Towards Sustainable Global Governance

In one of their recent publications, Dirk Messner and Franz Nuscheler point out three core problems in the present architecture of global governance. First, some key areas of global governance – especially environmental protection, the struggle against poverty and the securing of greater global justice – still exhibit huge regulation deficits. Second, the global governance architecture is characterized by a “proliferation and uncontrolled growth of global standards”. This leads to an overstressing of the capacities of (especially financially weak) states, and limits institutional diversity and competition for the best solutions. Third, the global governance architecture displays a multiplicity of heterogeneous and largely fragmented regulatory structures, which result in coherence deficits, institutional irrationalities and overlapping competences (Messner/Nuscheler 2003, pp. 45 ff.).

The dual strategy of reform and “ecologization” of the WTO – on the one hand, through instruments of strategic impact assessment, and on the other through restricting the political scope of the WTO by constraining its dispute settlement body and enhancing cooperation with other international institutions – might contribute to the redressing of these three deficits of global governance. First, the introduction of impact assessments might help to ensure that the WTO’s trade agreements also lead towards sustainable development. This would help to exclude institutional irrationalities, since the objectives of different international institutions might draw closer to one another, not only at the level of demands but also in their actual policies.

Second, restriction of the WTO’s Dispute Settlement Body and greater cooperation with other institutions would also reduce the counterproductive overlapping of international institutions. A limitation of the WTO’s policy competences would further help to ensure that there was no parallel proliferation of (mutually contradictory) standards and regulatory spheres. For a clarification of environmental measures recognized by the WTO, together with a differentiation between “legitimate” and “illegitimate” policies and measures of Multilateral Environmental Agreements, would double the policy competences affecting those agreements and lead to undesirable institutional unification. In opposition to this, calls have been made for institutional equity, understood as involving constructive heterogeneity among partly conflicting institutions in the global political arena, whose competences are nevertheless clearly demarcated from one another.

Third, these proposals have been discussed in relation to the goal of sustainable development. They might give the structures of global governance a more sustainable form and produce effects that point in the direction of sustainable global governance. The integration of instruments for impact assessment, together with enlargement of the scope for action of multilateral environmental institutions through the limitation of WTO competences, might help to redress the global regulation deficit in the key areas mentioned above, and, most especially, to strengthen the interests of environmental protection in the existing architecture of global governance.

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